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# 1932.

THE

# LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

## Probate Division.

## COURTS OF PROBATE, DIVORCE, AND ADMIRALTY,

AND ON APPEAL THEREFROM IN THE

## COURT OF APPEAL:

ALSO DECISIONS IN THE

## ECCLESIASTICAL COURTS.

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1932.

PUBLISHED BY THE COUNCIL AT ITS OFFICE, 30, MONTAGUE STREET, LONDON, W.C. 1,

AND

PRINTED BY W. SPEAIGHT & SONS, LTD., 98–99, FETTER LANE, LONDON, E.C. 4.

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# JUDGES

OF

# THE COURT OF APPEAL.

1932.

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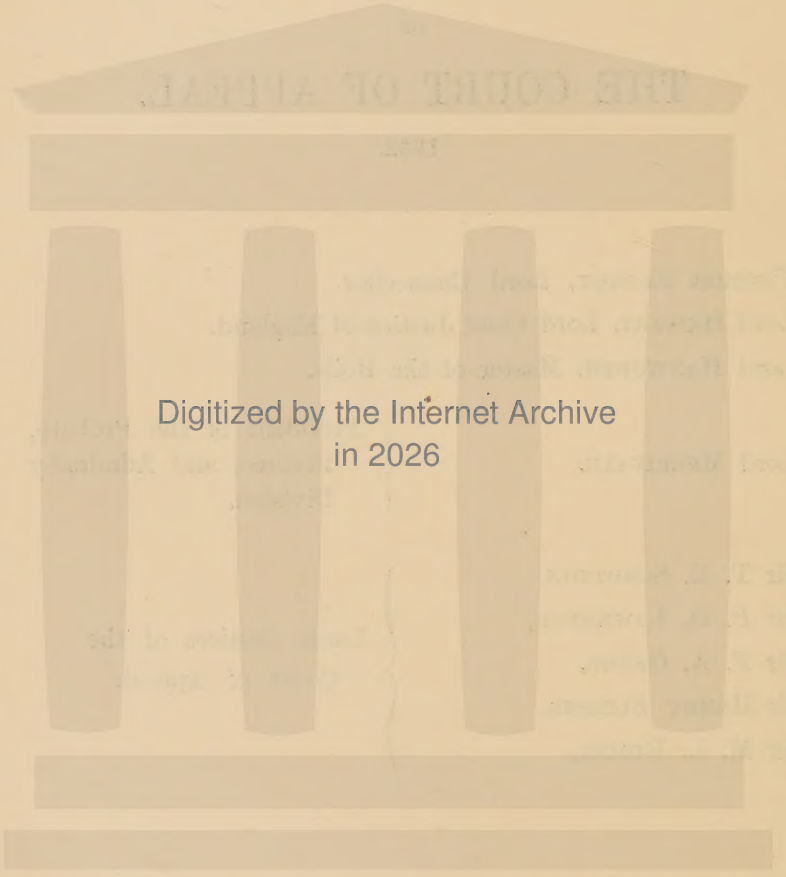

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# JUDGES

OF THE

# PROBATE, DIVORCE AND ADMIRALTY DIVISION

OF

# THE HIGH COURT OF JUSTICE.

1932.

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The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1932, will be as follows :—

In the First Series,
[1932] 1 Ch. [1932] 2 Ch.

In the Second Series,
[1932] 1 K. B. [1932] 2 K. B. [1932] P.

In the Third Series,
[1932] A. C.

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# CASES

DETERMINED BY THE

# PROBATE, DIVORCE AND ADMIRALTY DIVISION

OF THE

# HIGH COURT OF JUSTICE

AND BY THE

# COURT OF APPEAL

## ON APPEAL FROM THAT DIVISION

AND BY THE

# ECCLESIASTICAL COURTS.

---

## GRIST *v.* GRIST.

C. A.

1931

Oct. 12, 13.

*Divorce—Practice—Costs—Wife's Petition for Judicial Separation—Abortive Trial—Wife's Application for Costs of Trial—Refusal of Judge to make Order "at present"—Discretion—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 50.*

Although the general rule is that a wife is entitled to be paid by her husband the costs of the hearing of a petition for divorce or judicial separation, provided that they are fair and have not been unreasonably incurred, yet in the case of an abortive hearing the judge is entitled, in the exercise of his discretion, to refuse to make an immediate order for their taxation and payment and to postpone the making of the order until after the hearing of the second petition.

APPEAL from a decision of Bateson J.

On June 1, 1898, the petitioner, Kate Emily Grist, was married to the petitioner, George Alfred Malvern Grist. There were five children of the marriage, four of whom were daughters, the youngest being eighteen years of age.

On September 28, 1927, the respondent left his home, stating that he did not intend to return.

C. A. 1931

GRIST v. GRIST.

On July 1, 1930, the petitioner presented her petition against the respondent, charging him with adultery with a lady named in the petition, and asking for a decree for judicial separation. The petition was served on the respondent on July 7.

On July 9, 1930, the lady named was, at the instance of the respondent, medically examined by a doctor, who stated in his certificate that in his opinion she was virgo intacta. The result of this examination was communicated to the petitioner.

On July 7, 1930, the petitioner presented her petition for alimony pendente lite, and on October 22, 1930, an order was made thereon that the respondent should pay to the petitioner alimony pending the suit at and after the rate of 2*l.* a week, to commence from the date of the service of the petition.

On March 12, 1931, an order was made that the respondent should pay to the petitioner the sum of 37*l.* 6*s.* 11*d.*, being the amount of her taxed costs, and should lodge in Court the sum of 45*l.*, the estimated amount of her costs of the hearing of the cause. This order was duly complied with by the respondent.

On July 1 and 2 the petition was heard before Bateson J., and at the conclusion of the hearing the jury disagreed.

On July 22 the petitioner issued a summons asking that respondent should attend the judge to show cause why the full costs of the hearing of the petition when the jury disagreed should not be taxed and paid by the respondent to the petitioner.

On July 27 the summons was heard by Bateson J., who, following *Waudby* v. *Waudby and Bowland* (1), declined to make any order " at present " on the petitioner's application and refused leave to appeal.

On July 30, on the application of the petitioner, the Court of Appeal granted her leave to appeal from Bateson J.'s order.

The appeal was heard on October 12, 13, 1931.

(1) (1901) 17 Times L. R. 490.

*H. G. Garland* for the appellant wife.

*Noel Middleton* for the respondent husband.

The arguments sufficiently appear from the judgment of the Master of the Rolls.

C. A.
1931
GRIST
*v.*
GRIST.

LORD HANWORTH M.R. This appeal raises an important point, and we have had helpful arguments from Mr. Garland and Mr. Noel Middleton. The parties in this appeal were married in 1898 and there were five children of the marriage, four of whom were daughters. On July 1, 1930, the wife presented a petition for judicial separation on the ground of the husband's alleged adultery with a young woman named in the petition. A few days later the young woman was examined by a doctor acting for the husband, and he gave a certificate that she was virgo intacta. That is important but not conclusive evidence that there had been no adultery. The result of that certificate was communicated to the wife. The husband, an accountant, was in receipt of an income of about 700*l.* a year, the wife being without means of her own, and on March 12, 1931, an order was made that the husband should lodge in Court the sum of 45*l.*, the estimated amount of the wife's costs of the hearing of the petition. On July 7, 1930, the wife presented a petition for alimony pendente lite, and on October 22 an order was made allowing her 2*l.* a week, the payment to run from the date of the service of the petition. She also had the use of a house belonging to the husband.

The trial took place on July 1 and 2, 1931, and the husband's main defence was that the young woman still remained a virgo intacta; but there was evidence that the husband had behaved indiscreetly with this young woman, and in the result the jury disagreed. A deduction has been made from that that they were in favour of the petitioner, but for my part I think nothing can be inferred. It is enough to say that the jury disagreed. No order has been made for the payment by husband of the costs of that abortive trial. The only order made was for the payment into Court by him of 45*l.*, and with that order he has complied.

C. A. 1931

GRIST v. GRIST.

Lord Hanworth M.R.

On July 22 a summons was taken out by the wife asking that the costs of the trial, which had taken place, should be taxed and paid by the husband. That is to say, the petitioner desired that her costs should be paid or secured before she proceeded to a new trial. Upon that summons coming before Bateson J., the only decision he gave was that he would make no order "at present," and he refused leave to appeal. On an application, however, being made to this Court on July 30 we gave leave to appeal. Bateson J., in refusing to make an order "at present," based his decision on *Waudby* v. *Waudby and Bowland.* (1) In that case the husband charged the wife with adultery. No application was made by the wife for taxation or security for costs against the husband. The jury were unable to agree, and the wife thereupon asked for an order for the husband to pay her costs in respect of the abortive trial, and the President said that he thought that the wife's application must be refused. On appeal the Master of the Rolls said (2) that the learned President had not absolutely refused to give the wife her costs, but had only declined to make an order "at present." Following what was done in that case Bateson J. made no order on the present summons, and by so doing kept open his right to decide what would ultimately be the proper order to make as to costs. It must be borne in mind that there is the 45*l.* paid into Court, so that the wife is not altogether devoid of means to proceed. The judge exercised his undoubted discretion to adjourn the consideration of the matter to a later date. It has often been said that this Court is always very reluctant to interfere with a matter which is pre-eminently within the judge's discretion; but that reluctance must be overcome if it is plain that the judge has acted on a principle inconsistent with certain well defined rules of law.

It was contended by Mr. Garland that the learned judge in following *Waudby* v. *Waudby and Bowland* (1), misapprehended the full meaning of that case. After the second trial

(1) 17 Times L. R. 490. (2) 17 Times L. R. 620.

in that case (1) an order was made for the payment by the husband of the costs of both trials, but there had been no order, as here, for security for the costs to be given by the husband. On the second trial in that case the jury found adultery, and it was held that the wife was entitled to be paid the costs of both trials. Gorell Barnes J., in giving judgment after the second trial, said (2): "The wife succeeded in the present case in defeating the petition of her husband at the first trial, and, if matters had rested where they were and the petitioner had not proceeded to a second trial, she must have had her full costs of the first trial. I can see no good reason why she should not have them now; and I accordingly make the order that the petitioner pay those costs." In other words, he gave effect to the ordinary rule that a husband must provide costs properly incurred by the wife in a matrimonial suit, and when the matter was completed, as it was by the second trial, the judge held that the rule ought to be enforced in her favour. But I cannot find that anything that happened after the second trial in *Waudby's* case (1) in any way renders abortive the decision of the judge on the summons as to costs in the present case. It is quite true that later on the wife was granted her costs of the earlier trial, but that did not directly or impliedly negative the right of the judge, in his discretion, after the abortive trial to make no order "at present."

The contention has been put forward in the present case that the wife's right to receive the costs of an abortive trial is absolute and that there is no jurisdiction to deny them to her even for a time; but *Courage* v. *Courage* (3) shows that it is not necessarily all the costs of a trial which a wife is entitled to charge against her husband. In that case the judge refused to allow certain costs because they had been unreasonably incurred, and his decision was that the wife was entitled to all legitimate costs, but not to all costs of every kind.

In *Robertson* v. *Robertson* (4) Sir George Jessel M.R. said: "Now on principle it is plain that the whole foundation of

(1) [1902] P. 85.
(2) Ibid. 88.
(3) (1931) 47 Times L. R. 395.
(4) (1881) 6 P. D. 119, 122.

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the rule depends on the liability of the husband to pay the necessary and fair costs of the wife's defence." And he added: "If he himself (the wife's solicitor) conducts the litigation properly, if he fairly investigates the charges and sees a reasonable foundation for a defence, he is not to lose his costs and the fair remuneration for his labour, because he is not successful." That case is interesting as showing the origin of the rule.

The next case to which I need refer is *Hurley* v. *Hurley and Menzies* (1), where upon the trial of a husband's petition the jury disagreed, and the Court made an order that the wife's costs should be taxed and paid in full, and refused to limit such costs to the amount deposited in Court. All that that case decided was that where a sum had been deposited as security for costs the Court had an unfettered discretion to determine whether more or less than that sum should be allowed.

In *Kemp-Welch* v. *Kemp-Welch and Crymes* (2) the jury disagreed at the first trial and the husband proposed to have the petition retried, although he had not paid the balance of the taxed costs of the wife, which were not covered by a sum paid into Court. Proceedings were stayed until he had paid or secured that balance, and also given security for the wife's costs of the re-trial. In that case Cozens-Hardy M.R. (3), citing the judgment in *Robertson* v. *Robertson* (4), emphasizes the fact that it is only the wife's costs "properly incurred," the "necessary and fair costs," that are to be paid. Buckley L.J., be it noted, says (5) that on an order made on a husband's petition after an abortive trial that the husband should pay the wife her costs of the petition, and after taxation an order that the husband should pay the amount so taxed, the wife was entitled to have the further trial of the husband's petition postponed until the taxed costs were paid or security given. That case in no way infringes the rule.

(1) [1891] P. 367.
(2) [1910] P. 233.
(3) [1910] P. 236.
(4) 6 P. D. 119.
(5) [1910] P. 233, 240.

In *Sanders* v. *Sanders* (1) it was held that proceedings in a husband's second petition ought to be stayed until he had paid the balance of his wife's costs upon a first unsuccessful petition. That again was a case in which the principle was applied that a wife was entitled to her costs of an unsuccessful petition, on the basis of her being secured against an attack by the husband to which, through lack of means, she might not be able to offer an effective defence. That case followed *Kemp-Welch* v. *Kemp-Welch and Crymes.* (2)

Lastly, there comes the case of *Silver* v. *Silver and Grenfell* (3), where this Court stated plainly the rule of the Court. Warrington L.J. said (4): "I agree with the learned President that it is a rule of the Divorce Division, and the repeated decisions of the Court of Appeal, first of all in *Robertson* v. *Robertson* (5), and later in *Kemp-Welch* v. *Kemp-Welch and Crymes* (2), and *Sanders* v. *Sanders* (1), make it clear that it is at the option of the wife, who is made a respondent by her husband to a petition for dissolution of the marriage, to claim that proceedings in the suit shall be stayed until her costs have been provided for, and if there has been an abortive trial that the second trial shall not proceed until the costs of the first trial have been paid. That is the right of the wife." I do not wish in any way to add to or detract from what was said by this Court in that case, or from any rule laid down in it, but taking the ruling in that case, and in the other cases to which I have referred at their full face value, there is nothing in any of them which says that at the time when the final issue has not yet been determined, and when the full facts, perhaps, are not yet known, it is obligatory on the Court to hold that a wife's costs must be taxed and paid forthwith—at a time when the Court is not yet in a position to determine what are the fair and necessary costs of the wife.

In the present case, what has been done? The learned judge has not purported to alter or depart from the rules

(1) [1911] P. 101.
(2) [1910] P. 233.
(3) [1924] P. 163.
(4) [1924] P. 163, 172, 173.
(5) 6 P. D. 119.

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which have been laid down by the Court. What he has in effect said is: "Assuming that the wife is entitled to her costs I will not make any order at present, because there will be a better opportunity later for me to determine what is the proper order to make." He has accordingly reserved his right to make an order at a time more convenient, when he would know more of the facts of the case and be in a better position to decide. I think he was right in so doing.

Mr. Garland has contended that that will be for his client a denial of justice, because she will not have the means to contest the proceedings any further. I am inclined to doubt that, but even if it be so, I do not think we are entitled to overrule the very wide discretion given to the learned judge by s. 50 of the Supreme Court of Judicature (Consolidation) Act, 1925, and to say that he was wrong in postponing his decision until after the second trial, when he might well be in a better position to decide upon what is the proper order to make.

On these grounds I think the appeal ought to be dismissed.

LAWRENCE L.J. I agree.

ROMER L.J. I agree.

*Appeal dismissed.*

Solicitors for wife: *Alfred C. Warwick & Co.*

Solicitors for husband: *Cunliffe, Blake & Mossman, for Tolhursts & Cozens, Southend-on-Sea.*

W. I. C.

## BOLDRINI *v.* BOLDRINI AND MARTINI.

C. A. 1931 Nov. 26, 27.

*Divorce—Jurisdiction—Domicil—Foreign Petitioner—English Domicil—Onus of Proof—Registration as Alien—Aliens Restriction Act,* 1914 (4 *&* 5 *Geo.* 5, *c.* 12)—*Aliens Order,* 1920.

In a husband's suit for dissolution of marriage the wife objected to the jurisdiction on the ground that the domicil of the husband was not English. The husband was a waiter of Italian nationality and was registered as an alien in England, and as such was subject to the restrictions and liabilities imposed by the Aliens Restriction Act, 1914, and the Aliens Order, 1920 :—

*Held,* that the provisions of the Act of 1914 and the Order of 1920 did not preclude the petitioner from acquiring an English domicil of choice.

*Held,* also, on the facts, that the petitioner had discharged the onus on him of proving that he had acquired an English domicil of choice.

Decision of Lord Merrivale P. affirmed.

Appeal from a decision of Lord Merrivale P.

The petitioner, Abel Giacinto Boldrini, on September 20, 1923, married the respondent, Henriette Boldrini, at the Roman Catholic Church of St. Patrick, Soho, in the City of Westminster.

There were two children of the marriage, Maurice Henry Boldrini, born May 23, 1924, and Mario Paul Boldrini, born April 29, 1926.

The petitioner was an hotel waiter living at 12 Stacey Street, Charing Cross Road, and was of Italian nationality.

On September 29, 1930, he presented his petition for a decree for dissolution of his marriage on the ground of the respondent's adultery with the co-respondent, Luca Martini, in which he alleged that he was domiciled in England.

The respondent by her amended answer alleged that the petitioner was not domiciled in England, and denied the adultery as alleged in the petition.

The co-respondent by his answer also denied the adultery.

On July 21, 1931, the petition was heard before Lord Merrivale P. Adultery was then admitted, and the only questions before the Court were as to the domicil of the petitioner and the amount of the damages. The President held that the petitioner had discharged the onus of proving

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that he had acquired an English domicil, and assessed the damages to be paid by the co-respondent at 200*l.*

From this decision both the respondent and co-respondent appealed against the finding of the President as to domicil.

The following statement of the effect of the evidence as to domicil is taken from the judgment of the Master of the Rolls.

In 1914 the petitioner came to England. During the war he was called up to serve in the Italian Army, he being an Italian, and from 1916 to 1920 he served with the Italian Army. In 1920 he was demobilized and returned to England. In 1923 he married his wife, who was a Belgian, and whom he met in England. There were two children of the marriage. The name of the elder was Maurice Henry. The name Maurice is not a subject of comment, but it is noticeable that the petitioner did give his son the distinctly English name of Henry. The second son had as his first name an Italian name, Mario, but his second name was Paul. Both were living with the petitioner's parents in Italy, the elder having been living in Belgium till April last, while the younger was sent to Italy two and a-half years ago. There was a certain amount of restlessness as to where the petitioner and his wife should live. Some two years before the petition was heard there was some talk of their going to the United States, and a visit to the United States Consulate with a view to making inquiries as to going to some employment in the United States. That came to nothing. Soon after that, only last year, the petitioner went to Belgium with his wife for a fortnight with a view to acquiring some suitable business. That came to nothing. The petitioner said he had done those things to please his wife, but had no intention of leaving England. The petitioner was a waiter, who had saved some money. On July 1, 1930, he took a tenancy agreement of premises in Stacey Street, Soho, as a suitable house in which they could live and let rooms. For that he put down a premium of 405*l.* After that the respondent went to live with the co-respondent, and adultery was clear. The petition was presented in September, 1930, the petitioner

being resident at the time at the house for which he had paid the premium, a substantial part of his savings, and in respect of which he had undertaken serious responsibilities. The charge of adultery was not contested, and two questions were left for decision, domicil and damages. The amount awarded in damages was the not inconsiderable sum of 200*l.*

The appeal was heard on November 26, 27, 1931.

*J. P. Eddy* and *W. Latey* for the appellants. The petitioner has failed to discharge the onus imposed upon him by law of proving that he has acquired an English domicil: *Bell* v. *Kennedy* (1); *Stanley* v. *Bernes.* (2)

[LORD HANWORTH M.R. referred to *Udny* v. *Udny* (3); *Attorney-General* v. *Yule.* (4)]

The petitioner is an alien living in England under a certificate of registration under the Aliens Order, 1920. He is therefore entirely at the mercy of the authorities, who may deport him at any time. In those circumstances he cannot say he has a fixed determination of remaining in this country and making it his permanent home and so acquiring an English domicil. Before a man can exercise his right of choice he must be master of his own destiny.

Alternatively, without going so far as to say that a registered alien cannot ipso facto acquire a domicil of choice in England, it is submitted that the serious onus of proving animus manendi is made even more heavy by the fact of an alien being subject nolens volens to the restrictions imposed by the Aliens Order, 1920, and to the risk of deportation by an act of State. Where, as in this case, no steps have been taken by the petitioner after a residence of ten years to become naturalized and to free himself from those restrictions, there is an irresistible inference that he had no intention of settling here under such uncomfortable conditions. This point was never considered in the Court below. Had it been considered it would probably have turned the scale, other circumstances being almost equally balanced, against a finding of English domicil.

(1) (1868) L. R. 1 H. L. Sc. 307.
(2) (1830) 3 Hagg. Ecc. 373, 437.
(3) (1869) L. R. 1 H. L. Sc. 441.
(4) (1931) 145 L. T. 9.

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Again, although nationality is not conclusive as to domicil, all the authorities show that it is an important factor in proof of animus, and the fact that the petitioner had taken no steps to divest himself of his Italian nationality is important evidence against the acquisition of an English domicil.

The usual practice in the Divorce Division is to order an issue to be tried separately as to domicil on affidavits, documents, declarations and other material available, coupled with oral evidence. The advantage of that course is that the mind of the judge need not be cumbered with the merits of the main issue, which he may find he has no jurisdiction to try. Here no separate issue was ordered, with the result that the question of domicil was intermingled with merits, and, moreover, the usual ample material for proof of domicil required when the jurisdiction is challenged was not forthcoming. In those circumstances it is submitted that the Court might well order an issue of domicil to be tried out. A useful precedent for such a course is to be found in *Brown* v. *Brown*. (1)

*G. C. Tyndale* for the respondent and co-respondent was not called upon to argue.

LORD HANWORTH M.R. This appeal fails in spite of everything possible having been said in support of it. The question we have to determine is whether the President rightly directed himself on the law, and whether on the facts the petitioner was domiciled in England so as to entitle him to a decree nisi for the dissolution of his marriage. The facts are short. [His Lordship stated the facts as above set out and continued :] Jurisdiction in divorce in England depends on domicil, and there is no doubt that any one seeking to override his domicil of origin takes upon himself a heavy burden of proof. There must be an animus manendi accompanied by acts showing that it was more than a passing intention. That has been held over and over again. The principle was stated by Sir John Nicholl in the early case of *Stanley* v. *Bernes* (2) as follows : " For certain purposes a

(1) 1928 S. C. 542, 545. (2) 3 Hagg. Ecc. 373, 437.

man takes his character, *primâ facie*, from the place where he is domiciled and, *primâ facie*, he is domiciled where he is resident, and the force of residence, as evidence of domicil, is increased by the length of time during which it has continued. All these principles are clear; but time alone is not conclusive; for where is the line to be drawn? Will the residence of a month, or a year, or five years, or fifty years be conclusive? As a criterion, therefore, to ascertain domicil, another principle is laid down by the authorities quoted as well as by practice,—it depends upon the intention, upon the *quo animo*—that is the true basis and foundation of domicil; it must be a residence *sine animo revertendi*, in order to change the *domicilium originis*: a temporary residence for the purposes of health, or travel, or business has not the effect: it must be a fixed and permanent residence, abandoning finally and for ever the domicil of origin; yet liable still to a subsequent change of intention."

In *Attorney-General* v. *Yule* (1), which was recently before this Court, I went through all the cases, including *Bell* v. *Kennedy* (2); *Udny* v. *Udny* (3); and *Winans* v. *Attorney-General* (4), and I deduced the law on this subject to short and simple principles, such as few of our laws are capable of being reduced to, and I quoted the short summing-up of Lord Macnaghten in *Winans* v. *Attorney-General* (5): "So heavy is the burden cast upon those who seek to shew that the domicil of origin has been superseded by a domicil of choice! And rightly, I think. A change of domicil is a serious matter. . . . . The change may involve far-reaching consequences in regard to succession and distribution and other things which depend on domicil"; and I said (6): "It must be decided *animo et facto*. The *animus manendi* must be considered, the intention of the resident must be observed and deduced." The learned President in his judgment not only shows that he is fully aware of all these principles but he says: "If the matter had arisen two years ago, I think it would have been difficult to say that there

(1) 145 L. T. 9.
(2) L. R. 1 H. L. Sc. 307, 320.
(3) L. R. 1 H. L. Sc. 441.
(4) [1904] A. C. 287.
(5) Ibid. 291.
(6) 145 L. T. 9, 14.

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was proof which could satisfy the Court of a fixed and settled intention of the petitioner to make his permanent home here." He is there referring to the fact that until 1929 there had not been any overt act such as there had been in that year by reason of the petitioner taking a lease of his house and paying down 405*l.* by way of premium out of his savings.

The petitioner said he returned to this country after being demobilized, because "England was my country to stop here and live." The petitioner's evidence must be considered on that point, and it is to be noted that he did get a pass from the Italian Government after being demobilized to enable him to return to what he contends is his domicil of choice. Then he goes on to say that he established himself here with his wife and that he was carrying on with his wife the business of lodging-house keeper, he being the waiter and she the cook—a not unsatisfactory business; and the learned President held that he had discharged the onus of proving that he had become domiciled in this country.

Let us test the matter according to the suggestions of the respondent. She said the petitioner was of a wayward inclination, one moment looking to America and another to Belgium. Is not the right inference that after these wayward and irresolute attempts to go elsewhere, he comes back to the view that he will remain in England, and that he puts down what may be called an anchor in the sense that he takes a house and depletes his savings of 405*l.*?

An attempt has been made to put in further evidence and we admitted it, though this must not be taken as a precedent, because, as the petitioner was of Italian nationality and his wife a Belgian, it seemed best not to exclude the evidence.

The effect of this evidence is that the petitioner said after his wife had left him that he regretted having bought his house and would be glad to sell it, with the result that someone was brought to see it who thought of taking it, but it came to nothing. The purpose of this evidence is to show that he had abandoned his intention of residing in England.

I am unable to take that view of the evidence. What does it mean but that a man who has lost his wife by her being unfaithful to him with a man who has wronged him, as is shown by the fact that the President granted 200*l.* damages, thinks of going away? Are we to attach much importance to the fact that this man while acutely suffering from his wife says: "I wish to be free and I am sorry I have got this house"? What weight is to be given to these circumstances caused by misfortune? There is clear evidence of expressed intention to change the domicil of origin and of acts adding force to that intention and proving both animus and factum. It is said the President has too lightly allowed the onus on the petitioner to be discharged. It is always difficult to weigh the evidence of witnesses who, as here, have not been seen in the box. Everything points to the President being entitled to attach full weight to the facts proved before him which justified him in holding the onus to be discharged.

Then there is one more point to which I must refer—namely, that the petitioner is an alien subject to the Aliens Order, 1920, under which he had to report any movements of his to the police and was subject in certain circumstances to deportation. It was contended that such a man could not acquire a domicil here. There are cases which show that a person who is a prisoner or under restraint is incapable of selecting a domicil of choice and retains the domicil that he had when he was incarcerated. But it is possible for a foreigner after being in England for five years to become naturalized. It is beside the point, therefore, that the petitioner is an alien subject to the restrictions imposed by the Aliens Order, 1920, and that does not prevent his acquisition of an English domicil. The possible danger of being deported if he misbehaves himself does not militate against the acquisition of a domicil of choice animo et facto. It is impossible, therefore, to hold that, though subject to the restrictions imposed by the Aliens Order, the petitioner could not comply with Court's requirements as to acquiring a new domicil. He can still be master of his own destiny, and it may even be that he will become naturalized.

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There is therefore no ground for setting aside the decision of the learned President or for directing a new trial of an issue, as suggested by Mr. Latey. It is quite true that the Divorce Court does sometimes direct the trial of an issue, but here the simple issue to be determined by the President was as to domicil, and it was not complicated by questions of adultery and so forth, so that there is no ground for adopting the suggestion as to a separate issue. The appeal must therefore be dismissed with costs.

LAWRENCE L.J. I agree. The principles on which the question of domicil falls to be determined are well established and are not in dispute. On this appeal the only question is whether the evidence given at the trial justified the finding arrived at by the learned President. We have read and carefully considered the evidence, some of which is conflicting. We have not seen the witnesses, but, so far as I can judge from the shorthand notes, I have come to the conclusion not only that there was sufficient evidence to justify the finding of the learned President, but that upon the evidence this finding was clearly right. I do not propose to go through the evidence; my Lord has stated his view of the result of it, and I entirely agree with that view.

But then it was contended that the learned President had not given sufficient weight to the fact that the petitioner was an alien and therefore subject to the restrictions imposed by the Aliens Restriction Act, 1914, and the Aliens Order, 1920. It was said that as an alien he was residing in England on sufferance, as he had to report every change of address and was liable in certain circumstances to be deported. I think Mr. Eddy went so far as to contend that so long as the Act and Order were in force no alien could acquire an English domicil; Mr. Latey, on the other hand, did not put his contention so high as that, but was content to submit that the President had not given due weight to the effect of the statutory restrictions in considering the question whether the petitioner had discharged the onus which admittedly lay heavily upon him to prove that he had

changed his domicil of origin. I agree with what my Lord has said on that point. What had to be shown is that when the petitioner presented his petition he was residing in England with the fixed intention of making England his home. Such an intention may be proved notwithstanding the existence of statutory regulations imposing certain restrictions upon aliens which they have to comply with so long as they remain in this country; an alien may choose to live here permanently and to subject himself to those restrictions. In my opinion the provisions of the Aliens Restriction Act, 1914, and the Aliens Order, 1920, did not preclude the petitioner from acquiring a domicil of choice in England, and I have no doubt that the learned President, in arriving at his conclusion, gave due weight to the fact that the petitioner was an alien to whom those provisions were applicable.

I agree therefore that the appeal should be dismissed.

SLESSER L.J. I agree. I propose to confine my observations to the argument that, owing to the Aliens Restriction Act, 1914, and the Aliens Order, 1920, it is impossible for any alien, subject to the peril of being deported in certain circumstances and of suffering certain restrictions before being deported, to acquire a domicil of choice in this country. Mr. Latey did not put the argument quite so high, but contended that sufficient weight had not been given to these circumstances. I do not think that those advancing the argument have fully considered the history of the matter in question. It appears that at common law the King as custos regni had the right to expel aliens. It is so stated by Blackstone (Bl. Com., vol. i., p. 259). Speaking of aliens he says: "For so long as their nation continues at peace with ours, and they themselves behave peaceably, they are under the King's protection; though liable to be sent home whenever the King sees occasion." The next step in the history was that owing to the excesses of the French Revolution a number of persons sought refuge here, and Lord Grenville's Aliens Act (33 Geo. 3, c. 4) was passed in 1793 to control

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the entry of aliens and put restrictions upon them. A number of Acts dealing with aliens restrictively were subsequently passed, such as 7 Geo. 4, c. 54, and 6 & 7 Will. 4, c. 11. These Acts were finally repealed by the Statute Law Revision Acts, 1871 and 1874. In 1838, while Acts imposing restrictions on aliens were in force, the case of *De Bonneval* v. *De Bonneval* (1) came before the Court. That case dealt with the domicil of the Marquis de Bonneval, who died in Fitzroy Square on September 22, 1836, and was a French Marquis who had fled from France in 1792, and lived in England until 1814, when he returned to France, and from that time only resided occasionally in this country. The Court considered his actual residence here as an exile, and whether such residence indicated an intention animo et facto of changing his domicil, and decided on the facts that it was not established that he was domiciled in this country; but what is interesting to observe is that the Court indicates that if it had come to a different conclusion on the facts, it would have decided in favour of an English domicil, no suggestion being made by the Court or in argument that the existence of the Aliens Act of that time altered the position. It is not conclusive as the point was not argued, but it is an indication to justify the view that my Lord has taken, and which I share, that the fact of there being a danger of deportation hanging over the alien does not affect the question of his domicil.

*Appeal dismissed.*

Solicitor for appellants: *Wilfred Light.*
Solicitors for respondent: *Gisborne & Co.*

(1) (1838) 1 Curt. 856.

W. I. C.

## OAKES *v.* UZZELL.

1931
*July* 3, 6.

*Probate—Practice—Evidence—Attesting Witness Obligation to call Attesting Witness to prove Execution Cross-examination of Attesting Witness by Party calling Witness.*

The party propounding a will is bound to call one of the attesting witnesses to prove execution even if evidence of execution is forthcoming aliunde. The attesting witness when so called is the witness of the Court, and not of the party calling him, and can be cross-examined by the party calling him on any part of his evidence tending to contravene due execution.

ACTION for revocation of probate tried before Langton J. sitting with a common jury.

The plaintiff F. M. A. Oakes set up the intestacy of Anne Everett and claimed revocation of the probate in common form of a will of A. Everett, dated June 17, 1925, of which the defendant E. E. Uzzell was executrix. The due execution of the will was in issue.

The testatrix died on October 23, 1929. The will had the ordinary formal clause of attestation. The attesting witnesses were Cicely Louisa Such and Harold William Pack. On June 5, 1930, they swore affidavits to the effect that when requested to subscribe the will they did not know that it contained the signature of the testatrix, that they had no opportunity of satisfying themselves whether the document was in fact a will or that it was signed by the testatrix. They deposed that all the writing on the will was concealed from them by a silk handkerchief placed over it and leaving only a small portion of blank paper on which they signed their names, addresses and descriptions, and that the testatrix kept her hand on the document the whole time.

The writ in the present action was issued on November 24, 1930.

*Elliot Gorst* for the plaintiff.

*Bayford K.C.* and *H. D. Grazebrook* for the defendant.

[The evidence in reference to the execution was that of the defendant and the two attesting witnesses. The defendant

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deposed that the witnesses having been summoned the testatrix said to them, "I want you to see me sign my will." The testatrix then signed her name, omitting the final "e" in her first name, an omission which she supplied on her attention being called to it by the defendant.

Before the witnesses were called in the testatrix had placed a silk handkerchief over the top half of the will, which was a short one, leaving the attestation clause visible opposite to which the solicitor who had prepared the will had indicated in pencil writing where the testatrix should sign. The testatrix said, "I do not want them to see what I have done." The testatrix having signed, her signature and the attestation clause being visible, the witness Such signed, followed by the witness Pack. During the attestation the testatrix said, "This is just to see that Nell's all right."

"Nell" was the defendant who was the sole beneficiary under the will.

After some other evidence the attesting witness Cicely Louisa Such, who had since married the other attesting witness Harold William Pack, was called on behalf of the defendant.]

*Bayford K.C.* The defendant is bound to call one of the attesting witnesses to prove execution (*Bowman* v. *Hodgson* (1)), in which case Sir J. P. Wilde so held, although the execution was proved by the evidence of bystanders. The question next arising is whether such a witness can be cross-examined by the party compelled to call the witness. In *Jones* v. *Jones* (2) Sir Gorell Barnes P. is reported to have ruled that when a party is compelled to call the attesting witnesses to a will he may cross-examine such witnesses, as they are not the witnesses of either party but of the Court.

LANGTON J. I think that you are entitled to cross-examine the witness if necessary.

[The witness was then called on behalf of the defendant, and on her affidavit being brought to her notice said that she did not remember whether she saw the testatrix sign the will, but that her memory of the transaction was vague.]

(1) (1867) L. R. 1 P. & M. 362. (2) (1908) 24 Times L. R. 839.

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The other attesting witness H. W. Pack was called on behalf of the plaintiff. His evidence was that neither he nor his wife saw the testatrix sign, but that he was not clear whether the testatrix acknowledged her signature in the presence of the witnesses.

The judge having summed up, the jury found that the will was duly executed and the judge pronounced for it.

Solicitors for the plaintiff: *W. J. and W. F. Hellyar.*
Solicitors for the defendant: *Fairfoot & Co.*

R. M. M.

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## THE ALDINGTON COURT.

1931
*Oct.* 12.

*Shipping—Carriage of Goods—Bagged Cargo discharged in Bulk—Rates for Discharge.*

Part of a cargo of wheat in bags was discharged by the receivers at Avonmouth, where they had a grain elevator. To facilitate the discharge the receivers started the bags in the ship's hold and discharged the wheat in bulk by means of the elevator. Under the schedule of rates for discharging steamers at Avonmouth the rate for bulk cargoes was less than for bag cargoes, and the shipowners contended that they ought only to be debited with charges based on the rates for bulk cargoes:—

*Held*, that the cargo must still be regarded as a bag cargo, and that the shipowners were rightly debited with charges based on the rates for bag cargoes "discharged unweighed."

APPEAL by the plaintiffs, the United British Steamship Company, Ld., the owners of the steamship *Aldington Court*, from a decision of the judge of the Bristol County Court in favour of the defendants, the Co-operative Wholesale Society.

The plaintiffs claimed 67*l.* 9*s.* balance of freight on 31,000 bags of wheat carried from Australia to Avonmouth. The defendants admitted the claim, but counterclaimed in respect of charges for the discharge of the cargo, for which they alleged the plaintiffs had given them insufficient credit. The point in dispute between the parties was whether the discharge was to be regarded as of a bulk cargo or of a bagged cargo.

By a charterparty dated June 3, 1930, the plaintiffs agreed

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to carry in the *Aldington Court* a full and complete cargo of wheat in bags for delivery as to part at one safe port in the United Kingdom (subsequently designated as Avonmouth), and under a bill of lading, dated June 30, 109,465 bags of wheat were loaded at Adelaide. The defendants became purchasers of 31,000 of these bags and, in accordance with the terms of the charterparty and bill of lading, required delivery at their flour mills at Avonmouth. It was admitted that the defendants, as stevedores, were entitled to discharge their cargo at the plaintiffs' expense (in so far as the plaintiffs' share in the discharge was concerned), and, under the Bristol, Avonmouth and Portishead schedule of current rates for discharging bag cargoes of wheat, the plaintiffs, as against the freight, had to credit the defendants with 249*l.* 8*s.* 2*d.* The plaintiffs, however, contended that as it was more convenient to discharge by means of the defendants' grain elevator, the defendants, to suit their own purposes, "started" the bags—i.e., slit the bags in the hold of the ship, and discharged the wheat in bulk; and that the amount for which the plaintiffs had to give credit for the discharge in bulk was 205*l.* 14*s.* 4*d.* It was in evidence that for the sake of stability a certain proportion of a bulk cargo of wheat (about 5 per cent. as an average) has to be stored in bags. The schedule of rates (so far as material) was as follows :—

"*Grain and Seed—Bulk Cargoes.*

Wheat . . . . . 7½*d.* per ton.

*Bag Starting.*

When ship owner provides all labour . 80*s.* per 1000 bags.
When merchant provides portion . . 60*s.* ,, ,, ,,

. . . . . .

*Bag Cargoes Weighed on Deck.*

Wheat . . . . . 1*s.* 11*d.* per ton.

. . . . . .

In the event of any of the above Bag Cargoes being discharged unweighed the rates will be :—

. . . . . .

Bags weighing more than 145 lb. . 1*s.* 9*d.* per ton."

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The county court judge decided that the rate which the defendants were entitled to have applied was that based upon bag cargoes for bags weighing more than 145 lb. discharged unweighed—the rate of 1*s.* 9*d.* per ton—and subject to the plaintiffs' claim gave judgment on the defendants' counterclaim for 43*l.* 13*s.* 10*d.*

The plaintiffs appealed.

*H. L. Holman* for the appellants. While still in the hold the wheat was in bulk and the receivers had not actually got delivery; qua discharge, therefore, this was a bulk cargo. The rate for bag cargoes assumes that the cargo is discharged in bags, for there is a difference in the rate for bags weighing more than 145 lb. The proviso in the schedule as to "bag starting" applies to both bulk and bag cargoes. It is true that the shipowners could not have insisted on delivery in bulk, but the receivers for their own purposes took delivery in bulk and got the benefit of discharging at less expense than if they had discharged bag by bag, and from the common-sense point of view, apart from the construction of the schedule, that benefit should be shared between the shipowners and the receivers.

*Trapnell K.C.* for the respondents. The county court judge was right in regarding the cargo as a bag cargo. It was shipped and arrived in bags, and in fact the shipowner gets a higher rate of freight for a cargo in bags, inasmuch as the ship can only carry a smaller quantity. Bag starting is a very trivial part of the expense, and the proviso as to that only applies to the small percentage of a bulk cargo which has to be carried in bags for the sake of stability. The shipowners are claiming that a rate wholly unremunerative for hauling heavy bags about the hold is applicable to a cargo the whole of which was in bags.

*Holman* replied.

THE PRESIDENT (LORD MERRIVALE). This is an interesting point, and has been well argued by counsel on each side.

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The President.

It is a question of the proper application to a cargo of wheat from Australia, shipped in bags, of the schedule of rates at Avonmouth. The wheat in question was 31,000 bags, part of a cargo described in the bill of lading as "109,465 bags of wheat." The 31,000 bags came to be delivered at Avonmouth to the Co-operative Wholesale Society under conditions prevailing at Avonmouth whereby the Wholesale Society were entitled to discharge the bags, and to debit the plaintiffs—the shipowners—with charges for it as charges incurred by stevedores at the plaintiffs' expense. When the wheat had been discharged, upon reference to the schedule of rates prevailing at Avonmouth in 1931 (schedules which had been introduced in 1923 and amended in 1927), the parties fell out as to what was to be the allowance against freight which was to be made to the defendants, who had become owners of the cargo. The amount in dispute is not great. On the one side it was said the allowance was to be just under 250*l.*; on the other side it was said it was to be just over 200*l.* The Wholesale Society seem not to have been aware of the change of rates which had taken place in 1927, and they pleaded, originally, upon the old scale of rates, but when the matter came before the learned judge of the county court it was agreed that he had to apply the current schedule of rates operating since August 1, 1927. On the part of the appellants, the shipowners, it is said that this cargo was discharged as a bulk cargo. The bags were split in the hold and the stevedores brought their bucket apparatus into use and raised the wheat out of the hold by means of their bucket elevator. The appellants contend, therefore, that the appropriate rate is the bulk bucket cargo rate. The receivers, on the other hand, say: "No, this was a bag cargo—everybody who knew anything about it spoke of it as a bag cargo." That perhaps does not go for very much, but for my own part I have some difficulty in deciding now for myself as to when it could be said to have become a bulk cargo.

Looking at the matter broadly and applying the schedule of rates as best I can, I think that this cargo comes within

the denomination of a bag cargo and must be dealt with on that footing in the schedule of rates. It is true the schedule of rates has got a little confused. The 1923 schedule, which was in evidence, dealt broadly with bulk cargoes, bag cargoes, general cargo and wood goods, on good broad distinctions. In the amended schedule of rates the draftsman still dealt with bulk cargoes and placed them first, but put a sub-head under bulk cargoes of "bag starting"—i.e., an allowance in respect of the splitting of the bags to convert the bag wheat into bulk wheat. Then the schedule goes on to deal with bag cargoes, but it deals with them as "bag cargoes weighed on deck," followed by a proviso as to what the rate is to be if they are discharged unweighed. Mr. Holman very properly stressed some conceivable ambiguity which is introduced into the bargain of the parties by reason of the mode in which the draftsman who amended the schedule has dealt with it. But trying to understand what the schedule really means, I have come to the conclusion that this was to be regarded as a bag cargo and that the rate as to bag cargoes applies. The learned judge was accordingly right in the conclusion at which he arrived, and the judgment must be affirmed.

LANGTON J. In this case the argument for the appellants has been based upon two grounds. Mr. Holman invited us to look at the matter, first, upon the construction of the schedule, and, secondly, upon the ground of common sense. I will deal with the second contention first. Unfortunately the application of so-called "common sense" to questions of interpretation is apt to result in diversity rather than clarity of opinion. Many a man would shrink from construing a document and say modestly that he felt the matter was beyond him, but I have never yet met a man who was so modest as to say that he had not sufficient common sense to decide any question under the sun. In this case, if one were to apply the test of common sense, I imagine that one would endeavour to discover what this schedule was intended to mean upon the assumption that

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the schedule was made by far-sighted and fair-minded people, and I think that we would be unwise to make assumptions of that sort. What Mr. Holman has asked us to say is that we have here really a bulk cargo. I have sympathy with that line of argument, because a discharge of cargo in bulk costs the receivers less than the discharge of cargo in bags; but to say so at the outset seems to me perilously near assuming the point to be decided.

If, on the other hand, one turns to the construction of the schedule—by which I mean to what the schedule actually says—I think, whether we look, as my Lord has said, at the earlier schedule of 1923, or at the schedule of 1927, that the position in which the phrase " bag starting to bulk " is found is highly significant. In the first instance, in the schedule of 1923 " Starting to bulk " appears as a mere footnote to bulk cargoes. It would be strange, indeed, as a matter of interpretation of words, if it were construed as applying to everything that follows, namely, to the division of bag cargoes, general cargo and wood goods. It seems to me clear that in that schedule it can only be intended to apply to bulk cargoes. When one turns to the 1927 schedule the division is not quite so clear. " Bag starting " does not appear as a mere footnote to bulk cargoes, but it still appears in exactly the same position, just under " bulk cargoes," before " bag cargoes " and before " timber." Therefore, I think that the meaning of this schedule is that " bag starting " applies to bulk cargoes. To that Mr. Holman answers : " Yes, but do not forget that I say that this was a bulk cargo." Here, again, is the seductive argument which seems so close to a petitio principii. There can be no doubt that this cargo commenced the voyage, made the voyage and arrived as a bag cargo, and it only became a bulk cargo by reason of " bag starting." I cannot see that in this schedule there is any provision in words for a bag cargo which becomes a bulk cargo by " bag starting." I think, therefore, that the proper interpretation of this schedule as it stands to-day—whether it was so intended or not—is the interpretation which the county court judge placed upon it.

For these reasons I agree with the judgment that my Lord has delivered.

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*Appeal dismissed.*

Solicitors for the appellants: *Holman, Fenwick & Willan.*

Solicitors for the respondents: *Middleton, Lewis & Clarke, for James Inskip & Son, Bristol.*

E. C. M. T.

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## THE TORNI.

1931

*Nov.* 3, 4; *Dec.* 11.

*Shipping—Carriage of Goods—Palestine Carriage of Goods by Sea Ordinance, No.* 43 *of* 1926*—Hague Rules—Conflict of Laws.*

Certain parcels of oranges were shipped at Jaffa upon an Esthonian steamship for carriage to Hull. The ship was under time-charter to a British firm, who ran a line of steamships called the Jaffa Union Line. The bills of lading, which were signed by directors of a Palestine corporation, the Jaffa Union Line, Ld., contained the following clause: "This bill of lading wherever signed is to be construed in accordance with English law."

The plaintiffs were Hull fruit merchants, some of whom were indorsees of certain of the bills of lading and sued as owners of the cases of fruit therein mentioned; others had merely paid the freight and sued on an implied contract with the defendant shipowners to deliver the cases in good order and condition according to the terms of the bills of lading.

The Palestine Carriage of Goods by Sea Ordinance, No. 43 of 1926, adopted the rules relating to bills of lading generally known as the Hague Rules. Clause 4 of the Ordinance was in the following terms: "Every bill of lading . . . . issued in Palestine which contains or is evidence of any contract to which the Rules apply shall contain an express statement that it is to have effect subject to the provision of the said Rules as applied by this Ordinance, and shall be deemed to have effect subject thereto, notwithstanding the omission of such express statement."

The plaintiffs' action was in respect of damage and/or short delivery. The defendants set up various exceptions in the bills of lading, and the plaintiffs pleaded in reply that the contracts were governed by the Palestine Ordinance; that accordingly, notwithstanding the omission of a statement to that effect, the Hague Rules should be deemed to be written into the contracts, and, therefore, that the exceptions relied on were of no avail. The question whether the bills of lading were subject to the provisions of the Ordinance was set down for trial as a preliminary issue:—

*Held*, that it could not be presumed that the intention of the parties was to evade the provisions of the Ordinance, even if they could evade

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them, which was doubtful; that accordingly the parties to the original contracts made in Palestine must be held to have intended that the law of Palestine should apply; that whether the property in the goods had passed to the respective plaintiffs or not, their contracts with the shipowners could not be held to be different from that of the shippers; and that accordingly all the plaintiffs succeeded on the preliminary point of law.

PRELIMINARY POINT OF LAW in an action in respect of damage to and short delivery of cargo.

The facts are fully set out in the judgment. Very briefly stated they were as follows: The plaintiffs were "the owners of a cargo of oranges, ex the Esthonian steamship *Torni*." The defendants were the shipowners, but the *Torni* was in fact under time-charter to a Swansea firm of shipbrokers, who employed her in a line run by them, called the Jaffa Union Line.

Under a number of bills of lading signed by the directors of the Jaffa Union Line, Ld., a Palestine corporation, which acted as agents for the Swansea firm, certain cases of oranges were shipped on board the *Torni* at Jaffa for delivery at Hull to various consignees. Two of the plaintiffs alleged that the property in some of the cases of oranges had passed to them upon the indorsement of the respective bills of lading. Nine other plaintiffs alleged that they took delivery of certain cases and paid the freight, and that accordingly the defendants impliedly contracted with them to deliver in accordance with the terms of the bills of lading. All the plaintiffs complained of damage and/or short delivery.

The defendants set up various exceptions in the bills of lading, and the plaintiffs in reply alleged that the bills of lading were subject to the provisions of the Government of Palestine Carriage of Goods by Sea Ordinance, No. 43 of 1926 (1),

(1) GOVERNMENT OF PALESTINE. *Carriage of Goods by Sea Ordinance No. 43 of 1926.*

An Ordinance to amend the Law with respect to the Carriage of Goods by Sea.

"WHEREAS a Convention for the unification of certain Rules relating to bills of lading was adopted by the International Conference on Maritime Law held at Brussels in 1922 and 1923;

*And whereas* it is expedient that the Rules of the Convention, as set out in the Schedule to this Ordinance, should, subject to the provisions hereof, be given the force of law in Palestine with a view to establishing

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which incorporates the rules relating to bills of lading adopted by the International Conference on Maritime Law held at Brussels in 1922 and 1923, generally known as the Hague Rules. The defendants by their rejoinder denied that the bills of lading were subject to the Ordinance or that any of its provisions formed part of the contract, and further relied on a provision in all the bills of lading that "This bill of lading wherever signed is to be construed in accordance with English law."

The question whether the bills of lading were subject to the provisions of the Palestine Ordinance was set down for trial as a preliminary issue.

*van den Berg K.C.* and *Cyril Miller* for the plaintiffs. The Palestine Ordinance was made under, and derives its authority from, the Palestine (Amendment) Order in Council, 1923 (S. R. & O., 1923, No. 619), promulgated, in pursuance of the powers given by the Foreign Jurisdiction Act, 1890, by H.M. the King as Mandatory for Palestine, and is in one sense, therefore, English or practically English law. Under the Ordinance it would be a contravention of the law of Palestine to issue bills of lading not subject to the rules of the Ordinance (the Hague Rules), and, indeed, impossible, for the rules are deemed to be written into the bill of lading "notwithstanding the omission of such express statement."

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the responsibilities, liabilities, rights and immunities attaching to carriers under bills of lading;

BE IT ENACTED by the High Commissioner for Palestine, [Field-Marshal Lord Plumer] with the advice of the Advisory Council thereof:—

. . . . . .

2. Subject to the provisions of this Ordinance, the Rules contained in the Schedule hereto shall have effect in relation to and in connection with the carriage of goods by sea in ships carrying goods from any port in Palestine to any other port whether in or outside Palestine.

. . . . . .

4. Every bill of lading or similar document of title issued in Palestine which contains or is evidence of any contract to which the Rules apply shall contain an express statement that it is to have effect subject to the provision of the said Rules as applied by this Ordinance, and shall be deemed to have effect subject thereto, notwithstanding the omission of such express statement."

. . . . . .

SCHEDULE.

"*Rules relating to Bills of Lading.*"

(As in English Carriage of Goods by Sea Act, 1924.)

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The shipowners, therefore, cannot put forward a construction of the bills of lading, which is not only contrary to Palestine law, but to English law also, qua outward bills of lading, which must contain the provisions of the Hague Rules now incorporated in the Carriage of Goods by Sea Act, 1924. The terms of the Ordinance are the same as the terms of the statute, except for the striking proviso in the Ordinance that the rules are "deemed to have effect" notwithstanding their omission. It would be paradoxical, therefore, if a shipment between two countries, both of which have adopted the Hague Rules, could escape from the application of the Rules: and it would be contrary to public policy and good morals for a construction to be put upon the contract whereby the defendants escaped from the liabilities imposed by the Rules: see the observations of Lord Halsbury and Cotton L.J. in *In re Missouri Steamship Co.* (1) and *Ralli Bros.* v. *Compañia Naviera Sota y Aznar.* (2) The law of Palestine accordingly should be applied. It was the lex loci contractus; the country of shipment; the shippers were in Palestine, and, from their names, natives of Palestine; and the bills of lading were signed by directors of the Jaffa Union Line, Ld. The intention of the shippers must have been that the shipments were subject to Palestine law, for under that law the goods obtained the protection of the Hague Rules. But even if the Court should hold that English law must be applied the provisions of the Ordinance should still be treated as written into the contract: see *McFadden* v. *Blue Star Line* (3); the proviso that the bill of lading is to be construed in accordance with English law merely means that the Court will apply English rules of construction. The rights of all the plaintiffs depend on the bills of lading and the same law is applicable to them all. In the recent case of *The Adriatic* (4), where English law was held to be applicable, different considerations arose and the facts were wholly dissimilar. In respect of Palestine shipments, if not a misdemeanour, it is at any rate illegal to contract out of the Hague Rules, and *In re Missouri Steamship*

(1) (1889) 42 Ch. D. 321, 336, 339.
(2) [1920] 2 K. B. 287.
(3) [1905] 1 K. B. 697.
(4) [1931] P. 241.

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*Co.* (1) shows that the Courts will not give effect to conditions which would be illegal according to the law of the country where the contract was made: see also *In re Mahmoud and Ispahani* (2); Temperley's Carriage of Goods by Sea Act, 1924, 3rd ed., pp. 83 et seq., and Scrutton on Charterparties and Bills of Lading, 13th ed., appendix vii.

*W. Norman Raeburn K.C.* and *Sir Robert Aske* for the defendants. The plaintiffs are inviting an English Court to say that it will enforce a statute or ordinance passed in any dominion or indeed in a foreign country if that country is party to the Hague Rules. H.M. the King is the Mandatory of the Allied Powers, and Palestine is not British territory nor is its law English law, and there is no authority for the proposition contended for. The Harter Act in America has penal consequences, i.e., it is illegal to contract out of it; but an English Court does not construe it as an Act, but merely as words occurring in the bill of lading, and will only enforce its provisions if incorporated in the contract, or if the parties intended to be governed by American law: *Dobell & Co.* v. *Steamship Rossmore Co.* (3) Where the bill of lading does not expressly incorporate the local Act "there does not seem to be any ground upon which the English Court could give any effect to the Act except possibly in appropriate cases as being the proper law of the contract": Scrutton on Charterparties and Bills of Lading, 13th ed., appendix vii., p. 538. The test as to what law is applicable to the contract is to be found in the intention of the parties (*The Adriatic* (4) and the cases there cited), and the proper law of the contract in this case is English law. The strongest evidence in favour of this view is that the bills of lading themselves deal with the point; they expressly provide that "wherever signed" they are to be "construed in accordance with English law." This is the clearest indication of the intention of the parties: *Anselme Dewavrin Fils et Cie* v. *Wilsons and North Eastern Railway Shipping Co.* (5); see also *Hamlyn & Co.* v. *Talisker*

(1) 42 Ch. D. 321.
(2) [1921] 2 K. B. 716.
(3) [1895] 2 Q. B. 408, 413.
(4) [1931] P. 241.
(5) (1931) 39 Ll. L. R. 289.

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*Distillery.* (1) Business considerations also point to the conclusion that English law should be held to apply. The plaintiffs are Hull fruit merchants with no knowledge of Palestine law, it was an English time-charter, the place of delivery was Hull, and the plaintiffs seek their remedy in an English Court. Further, as there are exception clauses in this English form of bill of lading valid in England on inward bound shipments but useless if Palestine law is to be applied, the presumption is that the parties must have intended English law to apply: *In re Missouri Steamship Co.* (2) The Ordinance does not say that it shall be illegal to contract out of the Hague Rules, but merely that it shall be of no effect. No question of public policy in the proper sense of those words arises, and on that point also *In re Missouri Steamship Co.* (2) is in the defendants' favour.

None of the plaintiffs are entitled to the benefit of the Ordinance; but if, contrary to the defendants' contention, it be decided that Palestine law applies to the construction of the bills of lading, there is a distinction between the two plaintiffs who sue as indorsees and the larger body of plaintiffs; the latter, at any rate, would not be affected by that decision, for their contract is merely an implied contract with the shipowners that having paid the freight the goods will be delivered in good order and condition as provided by the bills of lading: see *Brandt* v. *Liverpool, Brazil and River Plate Steam Navigation Co.* (3)

[Reference was also made to Temperley's Carriage of Goods by Sea Act, 1924, 3rd ed., p. 84, and Scrutton's Charterparties and Bills of Lading, 13th ed., appendices iii., iv., vi.]

*Miller* replied. The bill of lading cannot mean one thing in one place and something different in another, depending on the identity of the holder. The contract must be interpreted without reference to change of parties: see the observations of Lord Warrington in *Frenkel* v. *MacAndrews & Co.* (4), and indorsees are in the same position as the shippers: *Cox* v.

(1) [1894] A. C. 202.
(2) 42 Ch. D. 321, 337.
(3) [1924] 1 K. B. 575, 589, 600.
(4) [1929] A. C. 545, 567.

*Bruce* (1); see also Atkin L.J.'s observations in *Brandt's* case. (2)

*Cur. adv. vult.*

Dec. 11. LANGTON J. read the following judgment: This case belongs to a class which I have already referred to in a judgment which I delivered last term as a kind of case which generally presents difficulties to me. It is no exception to that rule. Since I have endured in the present case the refined but well-merited torture of listening to almost the whole of my somewhat prolix judgment in the previous case (*The Adriatic* (3)) read to me viva voce, I will say at once that I have found very little therein which has been of any assistance to me in this case.

Although one of the points to be determined now is the same as in *The Adriatic* (3)—namely, which of alternative systems of law applies in interpreting the several contracts between the parties, the facts are wholly dissimilar. In the present case certain parcels of oranges were shipped from Jaffa and carried to Hull upon the steamship *Torni*. The vessel is owned by the Reval Shipping Company, Ld., an Esthonian company, and is an Esthonian ship. At the time in question, January, 1930, she was under time-charter to Messrs. Stockwood, Rees & Co., shipbrokers of Swansea, and was employed by them in a service which they advertised to the world in general and Palestine in particular as the Jaffa Union Line. All the bills of lading concerning these oranges were dated in Jaffa and signed in Jaffa by persons purporting to sign as directors of the Jaffa Union Line, Ld. It was proved in evidence before me, upon testimony which I accept, that the Jaffa Union Line, Ld., is a corporation under the law of Palestine, which has been formed by certain gentlemen in that country who act as agents for Messrs. Stockwood, Rees & Co. Some of the preference shares in the Jaffa Union Line, Ld., are owned by Messrs. Stockwood, Rees & Co., and they pay the Palestine corporation a loading commission upon all shipments made at Jaffa upon ships which sail in the

(1) (1886) 18 Q. B. D. 147, 150. (2) [1924] 1 K. B. 575, 589, 600.
(3) [1931] P. 241.

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service known as the Jaffa Union Line. The average number of trips made per season in this service is about sixteen, but in a busy season the number has been as high as twenty-five. There was for a short while some obscurity in my mind as to the precise relationship of the Jaffa Union Line to the corporation known as the Jaffa Union Line, Ld. This obscurity was quickly and finally dispelled by Mr. Rees, who explained that the Jaffa Union Line was nothing more than a name for the service, used to advertise and designate the service. There was a house-flag flown by the *Torni* to show that she belonged to the service, and the bills of lading are headed by the words, "Jaffa Union Line," but there is no existing separate entity which bears this imposing title, and the words are descriptive only of the service of ships provided by Messrs. Stockwood, Rees & Co.

Upon the pleadings in the case the plaintiffs were divided into two classes. The first and smaller class contained two firms who sued severally as indorsees to whom the property had passed of two separate and comparatively small parcels of oranges. The second and much larger class comprised nine firms suing in respect of individual parcels of greatly varying size. This second class did not, however, purport to sue as indorsees or owners, but only as parties who had presented the bills of lading and paid the freight due thereunder. Upon this a case was raised of implied contract by the shipowners to deliver the oranges in good order and condition in accordance with the bills of lading. Some of the plaintiffs complained of short delivery and some of damaged goods, and some of both damage and short delivery, and two questions were submitted to me as preliminary points of law. The first of these was whether the law of Palestine or the law of England governed the interpretation of the contract, and the second whether the bills of lading were or were not subject to what may be called for brevity's sake the Hague Rules, under whichever law was found by me to be applicable.

The bills of lading are all identical in form and contain a large number of provisions protecting the shipowners, some

of which are pleaded in the defence. In reply the plaintiffs set up the Government of Palestine Carriage of Goods by Sea Ordinance, No. 43 of 1926, and claim that thereunder the provisions of the bills of lading relied upon in the defence are null and void and of no effect. By way of rejoinder the defendants deny that the bills of lading are subject to the Ordinance, or that the Ordinance formed part of or affected the contract between the plaintiffs and the defendants. Alternatively they say that the ship was at all material times under the flag of Esthonia, and in the further alternative rely upon the latter part of clause 14 of the bills of lading, which is in these terms: "This bill of lading wherever signed is to be construed in accordance with English law."

There can, of course, be no dispute, and there is no dispute in this case, that Palestine is at present mandated territory and His Majesty the King is the Mandatory for Palestine. In pursuance of the powers under the Foreign Jurisdiction Act, 1890, His Majesty made and promulgated the Palestine Order in Council, 1922, constituting (inter alia) the office of High Commissioner and defining the powers attaching to this office. In the year 1926 Field-Marshal Lord Plumer, as High Commissioner for Palestine, made and published an Ordinance (No. 43 of 1926) entitled the Carriage of Goods by Sea Ordinance, 1926. It was not suggested on the part of the defendants that this Ordinance was in any way ultra vires or in excess of the powers conferred upon the High Commissioner. Briefly stated the effect of this Ordinance was to apply to Palestine, with certain named and familiar exceptions, the rules relating to bills of lading adopted by the International Conference on Maritime Law held at Brussels in 1922 and 1923. These Rules are, of course, the Hague Rules which are now incorporated in the British statute (14 & 15 Geo. 5, c. 22), known as the Carriage of Goods by Sea Act, 1924. The Ordinance is in fact an obvious adaptation of the statute to conditions in Palestine, and for the present purposes differs from the statute in only one material respect. This difference, which is in my view of the greatest importance in this case, lies in a somewhat remarkable addition in the

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Ordinance to the parallel provision in the statute. Sect. 3 of the statute is in the following terms : " Every bill of lading, or similar document of title, issued in Great Britain or Northern Ireland which contains or is evidence of any contract to which the Rules apply shall contain an express statement that it is to have effect subject to the provisions of the said Rules as applied by this Act." Provision 4 of the Ordinance reads : " Every bill of lading or similar document of title issued in Palestine which contains or is evidence of any contract to which the Rules apply shall contain an express statement that it is to have effect subject to the provisions of the said Rules as applied by this Ordinance, and shall be deemed to have effect subject thereto, notwithstanding the omission of such express statement." It is difficult to conceive how a legislative authority could use stronger terms than those employed in the Ordinance to secure that any and every shipment made in the country under a bill of lading should be made subject to the provisions of the Rules enjoined. In the present case the bills of lading not only contained no express statement as directed by the Ordinance, but included the provision to which I have called attention at the end of clause 14, that the bill of lading wherever signed was to be construed in accordance with English law. Since the whole argument for the defendant shipowner turned upon this provision in clause 14, it is in my view most material to notice at the outset that this clause occurs in a bill of lading issued and signed in Palestine. By way of introduction, I think, rather than positive argument, Mr. van den Berg first contended that since an Ordinance of Palestine had its fount and origin in His Majesty's Order in Council, the law of Palestine was nearly or practically or almost English law. I think that one might agree that it is British made, or even that, in the jargon of the day, it comes under the heading of an " invisible export," but Mr. Raeburn, for the shipowners, made short work of the contention that it is English law or that there is any such thing as " nearly English " or " quasi English " law. Indeed, if the argument were sound, it would be not a little surprising to find, as one does, that the

Palestine Order in Council, 1922, invokes the Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37), as the source of the Royal Authority. The preamble to this statute states that its object is to consolidate the Acts relating to the exercise of jurisdiction out of Her Majesty's dominions. I think the words of this preamble clearly mark the distinction. English law comprises the law laid down by Parliament for England, Wales and for such other possessions, territories and dominions as take their law directly from this source in the same form as that laid down for England. All other law, whether of British origin or not, is for the present purpose, at any rate, foreign law.

Another aspect of the matter strongly relied upon by Mr. van den Berg was that if the shipowners' contention was sound, it would lead the Court to a conclusion so paradoxical as to be manifestly absurd. The Hague Rules are clearly incorporated in the law of Palestine. They are no less clearly incorporated in the law of England. But since in each case they apply only to outward shipments they would not, if English law were held to apply, cover a shipment such as this from Palestine. The position, therefore, would be produced in which a shipment from a country governed by the Hague Rules, made to a country also governed by the Hague Rules, would escape the Hague Rules. I agree that this sounds sufficiently absurd, but I am afraid that it is no part of my duty to strain the law in the laudable desire to produce logical results. In short, this aspect of the matter seems to me to belong to the area of general comment rather than of exact argument.

The strong points for the shipowners were that the bills of lading were in English, that they stated in unequivocal terms that wherever signed they were to be construed in accordance with English law, and they were received by Englishmen in England who might well be totally unaware of any law appertaining to Palestine. As a general principle no one nowadays questions that the test as to what law applies to the construction of a given document or contract is the intention of the parties at the time when the contract was made.

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Mr. Raeburn pointed to clause 14 of the bills of lading. If, he said, the contract deals expressly with the matter, this is the clearest possible evidence of the intention of the parties. As authority for this proposition, if authority were needed, he cited the judgment of Roche J. in *Anselme Dewavrin Fils et Cie* v. *Wilsons and North Eastern Railway Shipping Co., Ld.* (1) He urged too that there were excellent reasons in this case, from the business standpoint, why English law should have been intended to apply. Apart from the two cases which concern indorsees, the large bulk of the plaintiffs were mere sellers of oranges in Hull. It was to be presumed that the course of business followed in this case was the usual one, and nothing could be more convenient than that receivers of goods of this class should know exactly where they stood when they came forward to pay the freight and take delivery. Doubtless, he said, it was for the express purpose of achieving this desirable end that the express clause as to construction was inserted in the bills of lading. For these reasons (inter alia) he contended strongly that English law, meaning thereby the law of England in England, and not any transported or transposed version which might be applied in Palestine, governed the present contract. Upon the effect as regards the application of the Hague Rules, which I have called the second point here, he argued that, if English law applied, the Hague Rules were excluded since they applied to outward shipments only, and from the English standpoint this was an English inward shipment. If, on the other hand, the law of Palestine applied, he did not contend that as regards the small class of indorsees he could exclude himself from the operation of the Hague Rules, since the indorsee could be in no different position from the original shipper of the goods. As regards the second and large class, however, he claimed that since they were not claiming under the bills of lading at all, but were relying upon an implied contract arising from the payment of freight, this class could not claim to apply the Hague Rules to their claims. The contract made by the shippers was not their contract and they were neither

(1) 39 Ll. L. R. 289.

affected by it, nor could they claim any benefit thereunder. These contentions constituted a formidable array. Nevertheless I do not see this matter altogether in the light in which Mr. Raeburn so powerfully presented it.

I have had to ask myself in the first place what did the parties to the original contract contained in the bills of lading intend as to the law to be applied. These parties were, nominally, Esthonian shipowners and shippers resident in Palestine. In reality, as we know, the Esthonian shipowners were in nowise concerned in the transaction. No one has suggested here that the law of the flag should govern the contract. The real parties then were Messrs. Stockwood, Rees & Co., of Swansea, and the shippers in Palestine. On this footing there is much to be said for the application of English law, but in my view still more to be said for the application of the law of Palestine. Of the cases in the books the nearest to the present case was by common consent the case of *In re Missouri Steamship Co.* (1), and both sides claimed it as a decision in their favour. It is a very familiar and well-tried authority, and concerned the shipment of cattle from Boston, U.S.A., to England upon a British ship by a British company, whose domicil was England. The shipowners claimed the benefit of the negligence clause in the bills of lading, and the shipper replied that it could not avail them because such a clause would be invalid according to the law of the State of Massachusetts, where the bills of lading were signed, given and accepted. A very strong Court of Appeal, consisting of Lord Halsbury and Cotton and Fry L.JJ., affirmed unanimously a judgment of Chitty J. in favour of the shipowners. But Lord Halsbury, in the course of his judgment, makes the following express saving: "I put aside, as Sir Walter Phillimore candidly put aside, questions in which the positive law of the country forbids contracts to be made. Where a contract is void on the ground of immorality, or is contrary to such positive law as would prohibit the making of such a contract at all, then the contract would be void all over the world, and no civilized country would be called on

(1) 42 Ch. D. 321, 336, 339.

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to enforce it." Similarly Cotton L.J. adopts the same position in the clearest possible terms: "As the Lord Chancellor has said, I do not enter into the question what will be the result where parties have made in America a contract which they intend to be governed by English law, when according to the American law such a contract would be itself illegal." Fry L.J. deals with this aspect of the matter in a less precise way, but he too draws the clear line between what is merely void and what is actually illegal according to the law of the country where the contract is made.

*In re Missouri Steamship Co.* (1) is therefore an authority for the proposition that the English Courts will not refuse to uphold a stipulation in a contract merely because that stipulation would have been held to be void in a country where the contract was made. It is, however, no authority at all for the proposition that the English Courts will enforce a stipulation which is prohibited by the positive law of the loci contractus, or which would be illegal according to that law. It might, perhaps, be argued that Lord Halsbury's dictum, which I have cited above, was obiter to the case in hand, but it is at least not lacking in clarity or incisiveness, and, whether obiter or not, I should be surprised even to hear it challenged.

Now, as I have already pointed out, the legislative authority for Palestine has been at quite extraordinary pains to incorporate the Hague Rules in the positive law of Palestine. Not content with including them in an Ordinance as they are included in the Carriage of Goods by Sea Act, 1924, the Ordinance goes on to provide that even in the absence of the express statement which the Ordinance expressly enjoins, every bill of lading issued in Palestine shall be deemed to have effect subject to the Rules contained in the Ordinance.

The bills of lading in the present case were issued in Palestine. The shippers in practically every case bore names eloquent of Eastern origin, and it is not suggested that they were not at least residents if not natives of Palestine. Am I to imagine that, in the face of the insistent terms of the Ordinance, they nevertheless intended and agreed to contract

(1) 42 Ch. D. 321.

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themselves out of the benefit which that Ordinance was designed to confer upon them ? Can I infer that they were entitled to do so ? And, in the face of Lord Halsbury's plain pronouncement, have I any right to enforce such a provision as that contained in clause 14 of the bill of lading, which would be a clear infringement of the law of Palestine if it were to be taken to exclude the Hague Rules, which ought to have been expressly included, and are to be deemed to be included even in the event of actual omission ? In my view it would be both contrary to law and contrary to common sense so to hold. To my mind the terms of the Ordinance are stronger than the parallel and familiar terms in the Harter Act of the United States of America. The Harter Act (Act of Congress, 1893, No. 57) declares that words or clauses contrary to its provisions are to be null and void and of no effect, and the Hague Rules themselves, art. 3 (8.), go just as far in this direction. In a word, the Harter Act says that you must not evade the Act, but the Ordinance seeks to go a step further. It says you cannot evade the Ordinance however hard you may try. I accordingly decline to believe that these parties in these circumstances either intended to evade or, if they so intended, succeeded in evading the Ordinance. To put it another way, I am not really sure that in the face of an Ordinance of this kind the familiar question as to the intention of the parties really arises at all. I incline rather strongly to the belief that it is taken out of their hands, and, so far as the Hague Rules are concerned, they have no longer any right to an opinion or intention. But, if I am wrong in this view, I hold that in view of the facts that these goods were shipped by a regular service from Palestine, bearing a name taken from a Palestine port, that the shippers were presumably residents in Palestine, that the bills of lading were issued in Palestine, and the law of Palestine has dealt quite recently and quite concisely with this express point concerning bills of lading, the intention of the parties must be taken to be that they contracted upon the footing that the law of Palestine should apply to the contract.

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At this stage it becomes material to consider Mr. Raeburn's second point—namely, as to the effect of the decision which I have reached upon the second and larger body of plaintiffs. As regards the first body, only two in number, it is clear and, as I understand, conceded, that they can be in no better or worse position than the original shippers. They succeed, therefore, completely upon the present issue, once I am satisfied that the law of Palestine applies to the bills of lading.

As to the larger body I confess that I have had and still have some doubt. I dislike intensely the conception of a bill of lading as a chameleon amongst contracts, taking the colour of its meaning from the country in which it happens to be, meaning one thing in Jaffa and something very different in Hull. But there is undeniable force in the contention that these plaintiffs are not suing on the bills of lading at all, and that their contract with the shipowner is more naturally and more conveniently to be imagined as governed by the English law which they ought to know rather than by the law of Palestine which they would be most unlikely to know. By way of authority against the shipowners, Mr. Miller for the plaintiffs put forward *Cox* v. *Bruce* (1) and *Frenkel* v. *MacAndrews & Co.* (2) In neither of these cases was the point in issue really comparable to the present case ; in fact Mr. Miller frankly agreed that in the latter case the real question—namely, as to whether the vessel had deviated from the agreed voyage differed toto caelo from anything in issue here. So far as *Frenkel's* case (3) was concerned he relied upon certain isolated passages in the speeches of Lord Buckmaster and Lord Warrington as assisting his argument. The dictum which seemed to come nearest to his proposition was that which he took from the concluding paragraph of Lord Warrington's speech, in which he refers to the judgment of Fry L.J. in *Leduc* v. *Ward* (4), as establishing that bills of lading are to be construed according to ordinary principles of law. When that case is consulted it will be found that there, as also in *Cox* v. *Bruce* (1), the Court was dealing with the position of indorsees for value of bills

(1) 18 Q. B. D. 147.
(2) [1929] A. C. 545.
(3) [1929] A. C. 545, 569.
(4) (1888) 20 Q. B. D. 475, 483.

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of lading. I cannot feel, therefore, that in either of these cases I have any sound foundation upon which to proceed in dealing with a position which ex concessis is not ruled and regulated, as is that of indorsees to whom the property has passed, by the Bills of Lading Act, 1855.

It seems to me, therefore, that in the absence of any clear authority I must endeavour to deal with this matter upon known facts and ascertained principles. Upon the facts and law as I have found them the original contracts were made in Palestine in the form of bills of lading, and it was intended that the law of Palestine should apply to them. It is for the plaintiffs to prove their case. They come into Court with a case which, though not actually founded upon the bills of lading, is evidenced by those bills of lading. Moreover the freight has been paid by them at the rate agreed in those bills of lading. I do not know all the circumstances of their situation. They may be merely agents for the shippers. They may, though it is not pleaded, be persons to whom the property in the goods has passed. If they were merely agents it would be so strange as to seem absurd if it could be held that their contract with the shipowners was a different one, so far as the bills of lading are concerned, to that of their own principals. If, on the other hand, they are persons to whom the property has passed, one may well ask one's self why they should be in a different position to ordinary indorsees to whom the property has passed under the Bills of Lading Act? In any case, whether agents or property owners, are they not entitled to say: "We hold the bills of lading, we are content to be bound by their terms, and their terms cannot be different for us to the terms originally agreed between the parties"? In other words, when once they present the bills of lading and it has been ascertained what was the original contract between the shipowners and the shippers, it is for the shipowners to show that something has occurred to alter that original contract in the hands of the new holder. In the present state of commerce it is not difficult to conceive a case in which the shipowner could show such circumstances. Having arrived at the port of discharge an insolvent

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consignee or assignee is unable to pay the freight and take delivery of the goods. A new bargain is thereupon entered into by the shipowners with a person who is neither consignee or assignee. The contract in the bill of lading might then become of no importance, though the goods had been shipped and carried under the contract contained therein. But, in the absence of any evidence of circumstances which would or might change the original terms of the bills of lading, I do not think that upon any known principle the shipowner can be heard to say that a contract which meant one thing in its inception meant something else when it had passed into the hands of a fresh holder. It is to be remembered that upon the findings I have made the shipowners must be taken to have known all the original terms, so that there can be no business hardship in holding them to their own original terms.

In the result, therefore, my judgment is for both bodies of plaintiffs upon both the points submitted to me.

*Leave to appeal.*

Solicitors for the plaintiffs: *Pritchard & Sons, for Andw. M. Jackson & Co., Hull.*

Solicitors for the defendants: *Botterell & Roche.*

E. C. M. T.

## CLAYTON *v.* CLAYTON AND SHARMAN.

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*Dec.* 21.

*Divorce—Connivance—Conduct conducing—English Domicil and Marriage —American Decree of Nullity for Cause insufficient in English Law—Consent of Husband to Decree obtained by Wife—Wife's Marriage after Decree—Supreme Court of Judicature (Consolidation) Act*, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 178, *s.* 181, *sub-s.* 1.

A decree of a foreign Court in a country where the parties were not domiciled, purporting to annul an English marriage at the instance of the wife on the sole ground of want of cohabitation, was consented to by the husband, and the wife subsequently went through a form of marriage with another man with whom she cohabited.

The husband filed in this Court a petition claiming dissolution of his marriage on the ground of the adultery constituted by cohabitation under the form of marriage last mentioned. It appeared that both the husband and the wife honestly believed at the time of the proceedings in the foreign Court that those proceedings were competent and that their marriage was effectually dissolved:—

*Held*, that there was no guilty intention amounting to connivance on the part of the husband at the subsequent adultery of the wife, and further that although the facts might technically raise the discretionary bar of conduct conducing on his part, the latter offence was in the circumstances present of a degree which justified the exercise of the discretion of the Court in his favour.

*Lankester* v. *Lankester and Cooper* [1925] P. 114 distinguished.

ARGUMENT on reference to the King's Proctor under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 181, sub-s. 1, of a question arising on a petition for divorce.

The husband, Robert Clayton, whose English domicil was not questioned, filed a petition for the dissolution of his marriage with Mona Millicent Clayton, his wife, on the ground of her alleged adultery with James Ebenezer William Sharman since September 24, 1929.

The marriage of the husband and wife took place in England on May 11, 1926. There was no cohabitation of the spouses, and on May 13, 1926, the wife left England and went to reside in Canada, where she still had her permanent residence at the date of the petition. By what purported to be an order in Chancery of the Circuit Court for the County of Mayne in the State of Michigan in the United States of America dated December 10, 1928, on the application of the

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wife the marriage of the spouses was annulled and dissolved as invalid, "being a marriage in form of law but not in legal effect." Thereafter the wife and the co-respondent went through a form of marriage in Canada on September 24, 1929, and their subsequent cohabitation as husband and wife constituted the adultery now alleged. The petition was not defended, and came on for hearing at the Manchester Assizes, on May 11, 1931, before N. B. Goldie, Esq., K.C., Commissioner of Assize. The material facts were proved in part at the original hearing at the Assizes and in part before this Court, and in addition to formal evidence of the adultery charged were as follows: In November, 1928, the attorney in America for the wife caused the papers relating to the proceedings in the American Court to be served on the husband, and invited him to consent to a decree of nullity of the marriage. On advice then given him and to save further expense in connection with service by advertisement, the husband signed a consent accordingly.

The American decree to the purport and effect stated was served on the husband on December 10, 1928, an advance copy of the decree having been forwarded to him before it was pronounced.

The Commissioner of Assize, referring to *Apted* v. *Apted and Bliss* (1), adjourned the hearing for argument on behalf of the King's Proctor pursuant to the Judicature (Consolidation) Act, s. 181, sub-s. 1, and the question now to be argued before the Court pursuant to the direction of the Attorney-General was whether on the facts of the case there was connivance on the part of the husband, the present petitioner.

*W. N. Stable* for the King's Proctor. It cannot be contended that the American decree of nullity was valid. The marriage was not celebrated in America and there was no domicil in America, and the Court purported to act on a ground unknown to English law. The second marriage of this woman was therefore bigamous, and the real question for the Court is whether the present petitioner, the husband, by consenting

(1) [1930] P. 246, 259.

to the American decree, did not thus by his conduct connive at the adultery of his wife and the co-respondent arising from their subsequent cohabitation. *Lankester* v. *Lankester and Cooper* (1) presented a very similar state of facts. In that case the husband was found guilty of connivance, and it was expressly laid down by the Court that a further finding of conduct conducing was involved in the first finding, and the petition was dismissed. The principle of *Moorsom* v. *Moorsom* (2) applies. "The rule is 'volenti non fit injuria,'; that is the true principle." The present petitioner cannot succeed. His consent to the American proceedings directly led to the adultery of his wife.

*E. I. G. Unsworth* for the petitioner. The petitioner signed the so-called consent because he was, in the first instance, so advised. His conduct does not amount to connivance, because there was not on his part any "corrupt intention" within the meaning of the words as used in *Moorsom* v. *Moorsom*. (3) In *Marris* v. *Marris* (4) the Judge Ordinary said: "By connivance I understand that the husband so behaves himself as to give a willing consent to the act." At the utmost the act of the petitioner in this case amounted merely to conduct conducing, and the Court in its discretion should relieve him from the consequences, as he acted bona fide.

THE PRESIDENT (LORD MERRIVALE). This case is a remarkable one, and it shows how much care is desirable in the exercise of the jurisdiction in divorce. The learned Commissioner who was sitting at Manchester, where the case came on for hearing, recognized the difficulties, and thought it was a case which could not be decided off-hand, and directed that the papers should be sent to the King's Proctor. It has been presented by the King's Proctor, not with any animus against the petitioner, but because it is necessary to know whether a divorce can be granted in circumstances such as existed here;

(1) [1925] P. 114.
(2) (1792-3) 3 Hagg. Ecc. 87, 107.
(3) 3 Hagg. Ecc. 87, 117.
(4) (1862) 2 Sw. & Tr. 530, 543.

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and it is said that the case, in its essence, resembles *Lankester* v. *Lankester and Cooper* (1), heard before me, where this Court said: Here is proof that the adultery, the charge in the petition, was adultery connived at by the petitioner and therefore he cannot be heard to say that his wife was guilty of adultery, and not only was it connived at, but conduced to by the intentional acts of the petitioner; and counsel for the King's Proctor, who presented his case with absolute fairness, says that there are facts in this case also which must be seriously considered. The relevant facts are these: the parties were living in the North in the neighbourhood of Chorley or in the Chorley registration district of Lancashire, a young man and a young woman; the young woman was proposing to go to Canada, and the proposal between them was that they should first go through a ceremony of marriage, which they did, and thereupon, without any substantial lapse of time, the marriage having taken place in the Register Office at Chorley, the young woman went to Canada, and subsequently to the State of Michigan in the United States. She had maintained herself in England, and she maintained herself there, and after a lapse of something like two years and a half she began to realize that she had done a very foolish thing. If she had had any affection for the petitioner, it declined, and there was in this country proof of marriage. A local attorney was consulted as to what her position was, and he advised her with his own knowledge of the law of Michigan, and said that, in a case of this kind, where there had been a ceremony of marriage but the spouses had never lived together, it could be treated in Michigan as a nullity, unless one party could show cause why it should not be; and he thereupon proposed to the lady that he should write to the husband in England, enclosing a copy of a petition, inform him what was proposed to be done, and invite him to accept service of proceedings, and, so as to accelerate the decree, certify his consent to the decree. This was done, and the husband I think not only accepted service but certified his consent to the decree of

(1) [1925] P. 114.

nullity proposed to be given, having consulted a solicitor who advised him upon the whole matter and considered that the best course to take was to consent to what was proposed. This was in 1928, and following up the proceedings already pending, at the close of the year 1928, the State Court in Michigan pronounced a decree of nullity of the marriage. The respondent, supposing herself to be free, after some lapse of time went through a ceremony of marriage with the co-respondent in this case; that took place towards the close of the year 1929, and the co-respondent and the now respondent have ever since lived together as man and wife. Some time subsequent to the ceremony of marriage between the co-respondent and the respondent, the petitioner became aware of it, and he thereupon in July, 1930, filed a petition alleging in outline the facts to which I have already referred, setting out the order of the proper Court in Michigan, stating the cohabitation of the respondent and the co-respondent, and praying that his marriage with the respondent might be dissolved. Apparently he had different advice from that which he had before he became a party by acquiescence to the nullity proceedings in Michigan (I notice that the solicitors who now appear for him are not the same firm). He seems to have been advised that the decree of nullity was itself a nullity, and that he remains married. It was, of course, a very embarrassing situation. His wife had set up a new habitation some thousands of miles away, and with new associations, and he is a young man and might at some time desire to remarry, or at any rate to have the conjugal rights of a husband, and he takes these proceedings.

If the facts here were on all fours with those of *Lankester* v. *Lankester and Cooper* (1), the decree must be refused here, even if the judge might be reluctant to leave the petitioner in such a tangled situation. The petitioner has been a party to what has happened, and if people trifle with the obligations of matrimony they are likely in this country to find themselves very much embarrassed. Marriage should not be lightly undertaken, and it cannot be got rid of mechanically. So

(1) [1925] P. 114.

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I have to consider first of all whether the case is within the decision of *Lankester* v. *Lankester and Cooper*. (1) That was a case where a man of mature years, in a well established position, and acting upon advice of various kinds, having been undoubtedly married and having cohabited with the woman to whom he was married, subsequently arranged with her that she should take some proceedings in a Court on the other side of the water and get some decree against him with a view to her marrying somebody else. There was no doubt whatever about the marriage, both the parties knew they were married; they took their risk of success or failure in getting rid of the marriage tie which unquestionably existed; and there was no doubt about the adultery. The wife sought a decree in an American Court because she wanted to contract what she supposed would be a lawful tie with the other man. The facts in this respect are not different, but here the question still is whether the now petitioner connived at the adultery of his wife with the co-respondent; and, if he did not connive at her adultery, whether his conduct was such as conduced to it. For a person conniving at adultery there is no jurisdiction open here. But if his conduct merely conduces to adultery the Court has a discretion to consider whether that conduct is such as ought, in the common interests of society, to prevent him from getting a decree.

Now as to connivance, Lord Stowell laid down in *Moorsom* v. *Moorsom* (2) the principles which guide the Court, and in particular that connivance involves corrupt intention, and evidence merely of imprudence or inattention will not do. But neither that case nor *Marris* v. *Marris* (3) is on all fours with this case. In considering whether this petitioner connived at adultery, I have to determine whether he knowingly entered into an arrangement for a breach of the marriage laws. The elemental fact in the case is that he and the respondent were both advised, and I am satisfied were honestly advised, and both believed, that their marriage ceremony was effectually annulled by the proceeding in the Court of Michigan, and

(1) [1925] P. 114. (2) (1792–3) 3 Hagg. Ecc. 87.
(3) (1862) 2 Sw. & Tr. 530, 543.

that accordingly they were free. They were much in the same position as if the proceedings had been in a Court of this jurisdiction, competent proceedings in which, unknown to anybody who was concerned, there was some basic error which invalidated the decree. I have to ask myself whether people in that position ought to be considered as persons conniving at adultery if subsequently there was remarriage of one or the other. In my judgment they ought not. In my judgment connivance does involve what in its essence is a guilty act; it does involve what in its essence is a wrongful intention contrary to the law of the land. These people intended to observe the law; they were not aware, and they were honestly and by accident not aware, of the true position; and it would be wrong to say, I think, that the petitioner connived at the cohabitation of the respondent with the co-respondent.

There remains the question whether there was conduct conducing to adultery. In a sense there was, but there is a discretion of the Court. I have seen the petitioner, and I am satisfied he behaved quite honestly in the matter; I believe the respondent did the same. It has been an unfortunate happening for both of them; but the Court, having a discretion, ought to exercise it in favour of the petitioner. It was a case in which, unquestionably, the matter ought to be investigated—I have said what I have to say upon the care which was taken at the Assizes in regard to the matter—and the result is that I have now before me proof of the adultery of the respondent, in this sense, that she has lived in marital cohabitation with the co-respondent Sharman. It is not an adultery to which the moral taint of adultery attaches, but cohabitation contrary to the marital obligations from which she supposed herself to be free. Under the circumstances I propose to grant a decree nisi.

Solicitors for the petitioner: *Hatchett Jones & Co., for J. W. Unsworth & Son, Leigh, Lancashire.*

*The King's Proctor.*

R. M. M.

C. A.
1931
*Dec.* 9, 10, 11.
1932
*Feb.* 1.

## THE EDISON.

*Shipping—Collision—Assessment of Damages—Objection to Registrar's Report—Dredger Engaged on Constructional Work—Contract with Harbour Authorities—Total Loss—Loss increased through Poverty of Plaintiffs—Principles applicable—Interest.*

In November, 1928, the plaintiffs' dredger *L.* was sunk through the negligence of the defendants, who in May, 1930, admitted liability. At the time of the casualty the plaintiffs were engaged in dredging operations in Patras Harbour, Greece, under a constructional contract with the Harbour Commissioners. The contract was a profitable one to the plaintiffs, but contained severe terms as to penalties if the work was not completed within the specified period. The plaintiffs had strained to the utmost their resources of cash and credit to obtain the necessary plant which would qualify them to perform the contract, and had not the means to purchase another dredger when the *L.* was sunk. In order to carry on the contract, therefore, after the lapse of some time, the plaintiffs hired the dredger *A.* at a high rate. Ultimately the Harbour Commissioners purchased the *A.* and resold her on easy terms to the plaintiffs.

In assessing the damages the registrar allowed the value of the *L.* which he took as being the price paid for the *A.* (some 9000*l.* odd). He allowed in addition the cost of hiring the *A.*, certain expenses while the plant was lying idle, a certain sum to compensate the plaintiffs for delay in receiving their profits on the contract, and interest on the several sums from varying dates. The defendants moved in objection to the report, and Langton J. confirmed the report. The defendants appealed :—

*Held*, that the assessment had proceeded on the wrong basis ; that the losses sustained by the plaintiffs owing to the fact that they were using the *L.* in the performance of a very special contract with the Harbour Commissioners were not the direct and natural consequences of the collision and must be excluded ; that if the plaintiffs were given the value of the *L.* as a going concern at the time and place of her loss (which the Court would take in round figures at 9000*l.*), plus interest at 5 per cent. to the date of judgment, no extra sums could be awarded in respect of loss of profit or the hiring of the *A.*

Judgment of Langton J. [1931] P. 230 reversed.

Appeal by the defendants from a decision of Langton J. (1) on a motion in objection to the report of the Admiralty Registrar in assessing the damages suffered by the plaintiffs, the owners of the dredger *Liesbosch*, in a collision with the defendants' steamship *Edison*. The collision took place on November 26, 1928, in Patras Harbour, Greece, and the *Liesbosch* sank and became a total loss. The defendants admitted liability on May 7, 1930.

(1) [1931] P. 230.

At the time of the casualty the owners of the *Liesbosch* were under contract with the Harbour Commissioners of Patras to carry out certain excavation and other work for a sum of over 97,000*l*. The plaintiffs having been deprived by the negligence of the defendants of the use of the *Liesbosch*, and having exhausted their financial resources in buying plant necessary for the performance of the contract, were unable to purchase another dredger, but succeeded after some delay in hiring the Italian dredger *Adria* at an admittedly high rate of hire. Later they were enabled, by arrangement with the Patras Harbour Commissioners, to purchase the *Adria* on easy terms.

The plaintiffs presented their claim under five heads: (i.) the actual value of the lost *Liesbosch*, together with certain expenses attendant upon the purchase of the *Adria;* (ii.) expenses incurred during the time when the plaintiffs were unable to carry on any of the work of dredging but were obliged to maintain certain members of their staff and minor items of plant; (iii.) the hiring expenses of the *Adria* from May, 1929, to June, 1930; (iv.) extra cost of operating the *Adria* as compared with the *Liesbosch;* and (v.) loss of profit owing to cessation of all work under the contract for the period November, 1928, to June, 1929. The registrar allowed part (i.) in full. With certain reductions he also allowed the larger portions of parts (ii.), (iii.) and (iv.), and about one-third of the amount claimed under part (v.), the total amount allowed being 19,820*l*. 12*s*. 7*d*. out of a claim of 23,514*l*. 9*s*. 4*d*. The defendants moved in objection to the report.

Langton J. held that in first examining what the plaintiffs claimed to have lost and then testing each item by the criterion whether it was properly and necessarily incurred, the registrar had proceeded on the right principles; that the plaintiffs were bound to minimize the damages flowing from the loss of the dredger, and were entitled to take all reasonable steps to carry out their contract with as little delay as possible, having regard to all the existing circumstances, including the severe terms of the contract and their want of liquid assets; that consequently the hiring of the *Adria*

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to complete an important contract was a direct and natural result of the collision and a reasonable step to take. He accordingly dismissed the motion.

The defendants appealed.

*J. Dickinson K.C.* and *G. H. Main Thompson* for the appellants. It is not disputed that the plaintiffs did all they could, having regard to their financial difficulties, to mitigate damages; the question, however, is whether the damages claimed are not too remote. The actual damage done to a physical thing cannot be too remote; and *In re Polemis & Furness, Withy & Co.* (1), which might seem to be a decision more in favour of the plaintiffs than of the appellants, has not altered the law in any way. In that case the damage complained of was the direct consequence of the injury to the physical thing, and no question of contracts with third parties was involved. "The first, and in fact the only inquiry in all these cases is, whether the damage complained of is the natural and reasonable result of the defendant's act": per Brett M.R. in *The Notting Hill.* (2) The plaintiffs are entitled to the value of the dredger at the time of her loss, plus interest. In addition, if the dredger had had a fixed contract of employment, "the proper net sum for profits . . . . at the end of her existing charter" could have been added: *The Philadelphia* (3); see also *The Racine.* (4) But the dredger had no fixed charter or contract, and the contractual relations of her owners with the harbour authorities are too remote and should not have been taken into account. If, therefore, regard should not be had to the plaintiffs' obligations qua the harbour authorities, the appellants cannot be liable for the expenses incurred, as the plaintiffs allege, in mitigating damages for which, ex hypothesi, the appellants are not responsible.

The measure of damages in contract and in tort is the same, except that the second rule laid down in *Hadley* v. *Baxendale* (5)—namely, that damages which may reasonably

(1) [1921] 3 K. B. 560.
(2) (1884) 9 P. D. 105, 113.
(3) [1917] P. 101.
(4) [1906] P. 273.
(5) (1854) 9 Ex. 341.

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be supposed to have been within the contemplation of the parties are not too remote, is only applicable to contracts. The award of the registrar, confirmed by the learned judge, is directly opposed to the principles laid down in *Hadley* v. *Baxendale* (1), where loss of profit was held to be not the direct and natural consequences of the defendant's breach of contract: see also the judgment of Bowen L.J. in *The Argentino* (2); Lord Sumner's speech in *The Amerika* (3); and *Gee* v. *Lancashire and Yorkshire Ry. Co.* (4) The damages given here were very largely increased because the plaintiffs were too impoverished to make satisfactory terms within a reasonable time for the purchase of another dredger, but the fact that they were too poor to pay the market price is not a ground for increasing their damages. In *The Mediana* (5) Collins L.J. said: "Why is a millionaire from whom a picture is taken away to recover a smaller sum of money for the loss of that particular chattel . . . . than A., B., and C., who have no claim to be millionaires?" This case is simply the converse, and all the damages consequent on their financial impoverishment and contractual relations with the harbour authorities should be disallowed.

[Reference was also made to *Hobbs* v. *London & S. W. Ry. Co.* (6); *Speake* v. *Hughes* (7); *H.M.S. London* (8); *The Empress of Britain* (9); *The Valeria* (10); *Weld-Blundell* v. *Stephens* (11); *Banco de Portugal* v. *Waterlow & Sons, Ld.* (12); *James Finlay & Co.* v. *N. V. Kwik Hoo Tong H. M.* (13); *The Columbus* (14); *The City of Rome* (15); and *The Anselma de Larrinaga* (16); Mayne on Damages, 10th ed., p. 42; and Sedgwick on Damages, 7th ed., vol. i., p. 130.]

*W. Norman Raeburn K.C.* and *Lewis Noad* for the respondents. This case has nothing to do with remoteness of damage, the material issue is whether the plaintiffs acted

(1) 9 Ex. 341.
(2) (1888) 13 P. D. 191, 201.
(3) [1917] A. C. 38, 61.
(4) (1860) 6 H. & N. 211, 216.
(5) [1899] P. 127, 139.
(6) (1875) L. R. 10 Q. B. 111.
(7) [1904] 1 K. B. 138.
(8) [1914] P. 72.
(9) (1913) 29 Times L. R. 423.
(10) [1922] 2 A. C. 242, 248.
(11) [1920] A. C. 956, 979.
(12) (1931) 47 Times L. R. 359.
(13) [1929] 1 K. B. 400.
(14) (1849) 3 W. Rob. 158.
(15) (1887) 8 Asp. M. L. C. 542*n*.
(16) (1913) 29 Times L. R. 587.

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reasonably in doing their best to mitigate the damages. The registrar and the learned judge have found that they did, that they took all reasonable steps to carry out their contract having regard to all the existing circumstances, including their lack of liquid resources, and that the hiring of the *Adria* was a direct and natural result of the collision. Therefore, in accordance with the principles stated by Bowen L.J. in *The Argentino* (1), these damages are recoverable, for they flowed "directly and in the usual course of things from the wrongful act." It is true that the *Liesbosch* was not named in the contract with the harbour authorities, and therefore the plaintiffs could not say, as in *The Racine* (2); *The Kate* (3); *The Harmonides* (4), and *Thames and Mersey Marine Insurance Co.* v. *British and Chilian S.S. Co.* (5), which were all decided on the same principle: "We have lost under a profitable charter (or charters), or, because the ship was engaged in a profitable line, a particular sum of money." Here the plaintiffs had to do their best to get another dredger, and they have not been allowed any substantial sum in respect of loss of profit; what they have been allowed is the cost of hiring another dredger, i.e., the reasonable sums expended to save their profits. If the plaintiffs had done nothing they would have been met with the defence that they ought to have taken steps to get another dredger. If the defendants are right, an injured plaintiff must keep a reserve of cash or plant for the benefit of a wrongdoer. But a plaintiff is not required to mitigate damages at his own expense, he is not bound "to injure himself, his character, his business, or his property to lessen the injury caused by the wrongdoer": per Scrutton L.J. in *Banco de Portugal* v. *Waterlow & Sons, Ld.* (6)

In *Société Anonyme de Remorquage à Hélice* v. *Bennetts* (7), loss of towage remuneration caused by the tow having been injured in collision was held too remote, but if the tug herself had been injured that class of damage would have been

(1) 13 P. D. 191, 201.
(2) [1906] P. 273.
(3) [1899] P. 165, 171.
(4) [1903] P. 1.
(5) (1916) 85 L. J. (K. B.) 384.
(6) 47 Times L. R. 359, 361.
(7) [1911] 1 K. B. 243, 248.

recoverable: see the observations of Lord Sumner, then Hamilton J.

Damages akin to the damages awarded here have been given in actions of trover. In *Davis* v. *Oswell* (1) the value of the pony, plus the expense of hiring another horse, was given. In *Bodley* v. *Reynolds* (2) (trover for the tools of a carpenter who was thereby prevented from working) 10*l.* was given above the value of the articles taken: see also *France* v. *Gaudet* (3) to the same effect.

[Reference was also made by Scrutton L.J. to *Anglo-Algerian S.S. Co.* v. *Houlder Line, Ld.* (4); by Greer L.J. to *Borries* v. *Hutchinson* (5); *Cattle* v. *Stockton Waterworks* (6); and by Slesser L.J. to *Reid* v. *Fairbanks* (7) and *The Volturno.* (8)]

*Dickinson K.C.* replied.

*Cur. adv. vult.*

1932. Feb. 1. The following judgments were read:

SCRUTTON L.J. This is an appeal from a decision of Langton J. affirming the decision of the Admiralty registrar as to the amount of damages to be paid by an American shipowner for sinking a dredger near the Port of Patras. The dredger was at the time employed by her owners in carrying out part of a contract with the Patras Harbour Authorities to build a large line of quay, quay wall and mole, in the harbour of Patras. The dredger was not under any special charter; no special sum was to be paid for its services; the owners might have taken it away and substituted another dredger without any breach of contract; the specification in the harbour contract was mainly concerned with the building construction, but it was essential to the building of the quay walls that the dredger should remove soil to a specified depth, so that foundations might be laid for the quay wall.

(1) (1837) 7 Car. & P. 804.
(2) (1846) 8 Q. B. 779.
(3) (1871) L. R. 6 Q. B. 199.
(4) [1908] 1 K. B. 659.
(5) (1865) 18 C. B. (N. S.) 445.
(6) (1875) L. R. 10 Q. B. 453.
(7) (1853) 13 C. B. 692.
(8) [1921] 2 A. C. 544, 548.

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This is a case not of partial damage, which can be repaired, and a claim for the loss while the vessel was being repaired. It is a case of total loss, and in such a case the measure of damage laid down in *The Philadelphia* (1) is "the value of the vessel at the time of her loss, plus the proper net sum for profits or freights at the end of her existing charter." I discuss later the question whether those sums should not be included in the value of the ship at the time of her loss, instead of being added to it.

The actual figures awarded seem to me to suggest strongly that something has gone wrong in the working out of principles. Langton J. says in his judgment: "I can imagine few things more maddeningly provocative than to be called upon, as a consequence of sinking a somewhat elderly dredger, to pay a sum amounting to more than twice her value when generously computed." But it does not seem to have occurred to him that to pay twice the value generously computed of the ship you have sunk suggests that something has gone wrong with the assessment. The dredger *Liesbosch* was built in 1924, and purchased by her present owners in Holland in October, 1927, for 4000*l.*, 2000*l.* further being spent in getting her out to Patras. She began work in Patras in September, 1927, and was sunk in November, 1928, being at that time insured by her owners for 5250*l.* The registrar has assessed her value at the time of loss, November, 1928, at a little over 9000*l.*, and has reached that conclusion by taking the figure for which, in June, 1930, nineteen months after the loss, the Patras Harbour Board purchased the much older but larger dredger *Adria*, in order to sell her for the same sum to the contractors, they paying the price in instalments spread over four years. Why this sum is selected as the value of the *Liesbosch*, in November, 1928, I find it difficult to understand. Instead of giving interest on the value of the *Liesbosch* in November, 1928, till the date of judgment, which is one measure of damages, the registrar then gives interest on the sums he awards from May 11, 1929, to time of payment. This date is taken as being the

(1) [1917] P. 101.

date when the owners signed a contract to hire the *Adria*, they having no money to buy her. Taking this date, the claimants do not get interest on the value of the dredger at the time of the loss from the date of the loss for the six and a-half months till they sign the contract for the hire of the *Adria*; but they do get interest from May 11, 1929, on a number of sums which they did not pay till long after, for instance, on the hire of the *Adria* from May 11, 1929, to July 3, 1930. The oddities do not stop there, for the registrar then awards, in addition to the 9000*l.* value of the *Liesbosch* at the time of the loss, a sum of 10,000*l.*, roughly, more, or over 100 per cent. of the value, apparently as loss sustained in the working of the construction contract.

The plaintiffs' claim is under five heads :—

I. is said to be the value of the *Liesbosch* at the time of loss, but is in fact the price of the *Adria* about twenty months later plus the expenses incurred in purchasing her. I have already said I do not see how this can be the value of the *Liesbosch* at the time of her loss.

II. is the plaintiffs' expenses as contractors from the loss of the *Liesbosch*, in November, 1928, to the hire of the *Adria* in May, 1929. Of those about 400,000 drachmas are allowed —roughly, a little over 1000*l.* These damages seem, in fact, to be that the staff and implements for the construction contract were lying idle during this period. On the evidence, work could have been done in preparing the blocks for the quay walls, but the Harbour Authority would not allow it to be done, because it would lock up capital by premature payments for the work done. This seems to me to be too remote a consequence of the loss of the *Liesbosch*, and to make the wrongdoers liable for the loss on a contract not exclusively concerned with the employment of the dredger. I deal with this later.

III. Expenses incurred during the hiring of the *Adria*. It is clear that the plaintiffs hired the *Adria* because they had no money to buy her. In doing so they spent in fourteen months about 5000*l.*, more than half the value assigned to the *Liesbosch*, and then had after all to buy the *Adria* at the

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end of the fourteen months, at a price which must have been larger because its payment was spread over four years.

IV. The extra cost of working the *Adria* over the *Liesbosch*. On this head I do not understand how a claimant who has been given the value of his ship lost can also be given an extra sum because, in working the ship he buys, he does not get the value of the old ship. The figure given him for total loss should have taken into account all the direct loss he suffered by losing his ship, and not have added to this part of the loss he claimed to have suffered by working his contract with the substituted ship. This might be relevant in cases of partial loss, but seems to me to have no relevance in cases of total loss.

V. Lastly, the plaintiffs claimed a proportion of the profit they expected to make under their construction contract, lost because they were delayed six months in receiving it. The registrar has very properly cut down this claim, substantially by only giving them a sum to compensate them for delay in receipt of profits, and not a sixth share of the profits themselves, arrived at by contrasting six months' delay with three years' contract construction time; but, as appears hereafter, I do not understand how the construction contract, which has no special terms relating to the remuneration for the work done by the *Liesbosch*, comes into this matter at all.

I have repeatedly said that so far as questions of fact are concerned, the Court should be very slow to interfere with the decision of the very experienced registrar and merchants: *The San Gregorio* (1); *The Susquehanna* (2); but it is also clear that if the registrar purports to act on any principle of which the Court disapproves, or if his decision of fact obviously conflicts with some principle of assessment, the Court should interfere. It is unfortunately also true that until recently, possibly even at the present day, there is no very clear statement of the principles on which damage caused by collision is to be assessed, in spite of a number of decisions on the point of the highest tribunal. I am emboldened to make this remark by the fact that as late as

(1) (1922) 12 Ll. L. R. 249. (2) [1925] P. 196, 207, 210.

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1926, Lord Sumner, in *The Chekiang* (1), recognizes the justice of a similar criticism, and devotes some time to the exposition of the measure of damages in the case of ships owned by the Crown or public bodies, usually not employed commercially. Having read the authorities, I agree with Atkin L.J.'s remark in *The Susquehanna* (2): "This is one of those cases dealing with damages which in my experience I have found to be a branch of the law on which one is less guided by authority laying down definite principles than on almost any other matter that one can consider."

I also note the remark of Lord Sumner in *The Susquehanna* (3) that, though in theory one would consider the loss of the shipowner, by inveterate practice which cannot be disturbed the ship is treated as the claimant, and an isolated account taken as if the injured ship were the whole business of the shipowner. But generally, however, it is clear on the authorities that the measure of damages is the same in Admiralty and common law; and that it is the same in tort and breach of contract, except that in the latter case damages can be given in respect of circumstances which were in the contemplation of the parties at the making of the contract, which damages would not be given in tort.

The claims for damage to a ship by collision fall into two classes: I., where the ship is not lost but damaged so that for a time she cannot be used; II., where the ship is totally lost. In each of these cases there may be a sub-division according as the injured ship is one commercially used for profit, or is a ship used by bodies which do not carry on business to earn commercial profits, such as a dredger used by a harbour board, and used in their own work: *The Greta Holme* (4); *The Marpessa* (5); a lightship, *The Mediana* (6); or a King's ship, *The Chekiang* (7); *The Susquehanna.* (8) I refer to Lord Dunedin's and Lord Sumner's judgments for the discussion of these cases, and confine myself to the

(1) [1926] A. C. 637, 643.
(2) [1925] P. 196, 207, 210.
(3) [1926] A. C. 655, 664.
(4) [1897] A. C. 596.
(5) [1907] A. C. 241.
(6) [1900] A. C. 113.
(7) [1926] A. C. 637.
(8) [1926] A. C. 655.

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cases of ships commercially used whether for carriage of goods or for dredging.

Take, first, the case of damage to the ship other than total loss. The claimant is entitled to the cost of repairing the damage. But besides the actual damage done to the ship he has been prevented from using the ship to earn profits till the damage is repaired. How is this loss to be measured ? This was the question considered by the House of Lords in *The Argentino*. (1) At the time of the collision the *Argentino* had an oral engagement to go on Messrs. Westcott's berth for a Black Sea round to Batoum, which engagement, owing to the collision, she could not fulfil; but when repaired she was put on Messrs. Westcott's Black Sea berth for Odessa, and a sum was claimed which was arrived at by estimating how much less the *Argentino* had earned by reason of the change of berths. The registrar and Lord Esher thought this damage too remote. The President and the majority of the Court of Appeal—Bowen and Lindley L.JJ.—held that it could be considered. Bowen L.J. stated the principle thus : " The damages recoverable from a wrongdoer in cases of collision at sea must be measured according to the ordinary principles of the common law. Courts of Admiralty have no power to give more, they ought not to award less. Speaking generally as to all wrongful acts whatever arising out of tort or breach of contract, the English law only adopts the principle of restitutio in integrum, subject to the qualification or restriction that the damages must not be too remote, that they must be, in other words, such damages as flow directly and in the usual course of things from the wrongful act. To these the law super-adds in the case of a breach of contract (or to speak according to the view taken by some jurists, the law includes under the head of these very damages, where the case is one of breach of contract) such damages as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of its breach. With this single modification or exception, which is one that applies

(1) 13 P. D. 61, 191 ; (1889) 14 App. Cas. 519.

only to cases of breach of contract, the English law only permits the recovery of such damages as are produced immediately and naturally by the act complained of.

"A collision at sea caused by the negligence of an offending vessel is a mere tort, and we have only therefore to consider what has been in the particular case its direct and natural consequence. This consequence (in the case of an innocent ship which is disabled by an accident) is that its owner loses for a time the use which he otherwise would have had of his vessel. There is no difference in principle between such a loss and the loss which the owner of a serviceable threshing-machine suffers from an injury which incapacitates the machine, or the loss which a workman suffers who is prevented from earning money by the wrongful detention of plant which cannot at once be replaced. A ship is a thing by the use of which money may be ordinarily earned, and the only question in case of a collision seems to me to be, what is the use which the shipowner would, but for the accident, have had of his ship, and what (excluding the element of uncertain and speculative and special profits) the shipowner, but for the accident, would have earned by the use of her. It is on this principle alone that it is habitual to allow in ordinary cases damages for the time during which the vessel is laid up under repair in addition to the cost of the repairs themselves. But this is merely an application of the general principle, and is not the measure in all cases of the loss. It might conceivably, upon the one hand, be the fact that the damaged ship would not and could not have earned anything at all while laid up for repairs, though such a case must necessarily be exceptional. In such circumstances nothing ought to be allowed for demurrage. Upon the other hand the direct consequence of the accident might be that the injured vessel was necessarily thrown out of her employment, not merely during the period of repair, but for a longer period still. In such a case the loss could not properly be measured by the time taken in repairs alone.

"The questions, therefore, to be inquired into are two: the first, to what extent, if any, the vessel has been thrown

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out of employment by the accident; the second, what would have been the fair earnings of a vessel such as the *Argentino* advertised to sail, as was the *Argentino*, on Messrs. Westcott & Laurence's line to Batoum, excluding, as I have said, everything in the nature of uncertain and speculative profits." (1)

It will be noticed that Bowen L.J. limits the damages to "such damages as flow directly and in the usual course of things from the wrongful act . . . . such damages as are produced immediately and naturally by the act complained of," and excludes "uncertain and speculative and special profits" which are sometimes described as too remote. This is the reason why fishing vessels are not allowed the profits they might have made on the voyage which the collision prevented them from making: *The Anselma de Larrinaga* (2): see also *The Columbus* (3) and *The City of Rome* (4); and why in *The Philadelphia* (5) the claimant was not allowed anything for the fact that if the ship had completed the voyage which she was making at the time of the collision, she would have been in a place at a time when her market value was in fact much higher than it was at the time and place of the collision. Rise or fall of market is generally uncertain and speculative. I understand Lord Herschell in affirming the decision of the majority of the Court of Appeal to approve the language of Bowen L.J. but to point out that the claimants could not have both the profits lost and demurrage for the days under repair, for this would be to give the same amount twice.

In the case of total loss of the ship the case seems to me quite different. The claimant has lost his ship and is entitled to be paid the value of his ship at the time of the loss, plus interest from the time of the loss, till date of judgment. And the value of the ship is not necessarily limited to the market value of the ship, the price at which it could be sold at the time of the loss. This is well illustrated by the judgment

(1) 13 P. D. 191, 200–204.
(2) 29 Times L. R. 587.
(3) 3 W. Rob. 158.
(4) 8 Asp. M. L. C. 542*n*.
(5) [1917] P. 101.

of Lord Gorell (then Barnes J.) in *The Harmonides*. (1) That vessel was a liner of peculiar construction profitably employed in a well known line, but evidence was filed, and was probably accurate, that if put up for sale she would fetch 16,000*l*. ; the owners said that to them, with that profitable line, and as a vessel suited to that line, she was worth 31,000*l*. Lord Gorell said : " The real test is . . . . what is the value of the vessel to the owners, as a going concern, at the time the vessel was sunk." I should add " at that place," for if the vessel had to be replaced at Patras, expense and time might have been added to the cost of the vessel replaced.

But if this is " the value " of the ship to which the claimant is entitled, payable at the time of the loss, I do not see any room for the addition of profits on an existing contract which would have been made but for the loss. Suppose the lost ship is under a ten years' charter, is the claimant to have both the value of the ship as a going concern at the time of the loss, *and* the profits he would have made under the ten years' charter ? The value of the ship is an estimate, or rough capitalization, of the earning power of the ship for its life. You cannot give both the value of the ship and the profits it would probably earn. As Lord Herschell said in *The Argentino* (2), this would be giving the same amount twice. The fact that there is a ten years' charter, of course, must be considered in fixing the value of a going concern. It gives more certainty to the value, but is subject to the possibilities that the ship may be lost, or the charterer go bankrupt. As Maule J. remarks in *Reid* v. *Fairbanks* (3) : " The value of the ship is 3000*l*., because she is capable of earning money by carrying goods or freight. When you pay a man for his ship, you pay him for what it can or may or shall do to produce profit."

In the present case the registrar has added to the value of the ship roughly 100 per cent. for loss of profit caused by its loss. Now it is to be noticed that this is not a case of a ship under a definite engagement at a fixed rate. The dredger

(1) [1903] P. 1, 6. (2) 14 App. Cas. 519, 523.
(3) 13 C. B. 692, 722.

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has no charter and no time rate of remuneration. The owners had a profitable contract to do a large constructional work, some part of which required the use of a dredger, but they were under no obligation to employ this dredger; they could have sent her elsewhere and employed another dredger. A dredger was necessary to excavate a trench in which a wall would be built. Payment will be made according to work done, cubic measurement of earth excavated. There is not any time rate of payment for the dredger. This is very different from a profitable charter of the dredger. It is merely part of the plant, with a diver, a floating crane and other machinery, employed in the performance of a much larger contract for an unseverable work. It is like the shaft of a mill in *Hadley* v. *Baxendale* (1), or in *British Columbia Saw-Mill Co.* v. *Nettleship* (2), where loss of or delay to the shaft was not held to involve liability for the loss of profits to the mill, of whose machinery the shaft formed part.

Another marked point of difference between the present case and the ordinary claim for total loss is that the owners adopted a very unusual and extravagant way of replacing the lost dredger. They at first could not afford and had not sufficient money to pay for another dredger, and they hired one at a very high rate compared with the assessed value of the lost dredger. After paying this high rate of hire for a considerable time they then bought the dredger they had hired at a price higher than the ordinary, because payment of the price was spread over four years. I am not aware that the poverty of the injured person has ever been allowed to increase damages for loss of property before. In cases of failure to deliver goods, the measure of damage is the difference between contract and market price. I have never heard it suggested that if the injured person is too poor to pay the market price he can, therefore, increase his damages.

The learned registrar has found that the owners in their "lack of liquid resources" took reasonable steps to perform their construction contract and that such steps, and the attendant expenses, were direct and natural consequences of

(1) 9 Ex. 341. (2) (1868) L. R. 3 C. P. 499.

the collision. Langton J. treats the dredger as the main item of the owners' plant for the construction contract. Having carefully read the contract, I cannot understand this finding. The contract work largely consists of construction in which the dredger is not employed at all, once the foundation trench has been excavated. He holds the proper test to be what the plaintiffs have lost, and whether the sums they have lost are the result of operations properly incurred. But what the owners have lost is their dredger. If the Court gives them the value of their dredger at the time and place of the loss as a profit-earning dredger, and gives them interest on that value from the time of the loss till judgment, I do not see any room for a further award of profits they have lost because they cannot effectively replace the dredger by reason of their poverty, or because a contract which requires the use of a dredger becomes less profitable because the owners are too poor to replace the dredger on ordinary market terms. I am of opinion that neither sums due to the existence of such a contract, nor extra expenditure due to the owners' poverty, are direct and natural consequences of the collision. Further, to give such sums, in addition to the value of the dredger as defined above, appears to me to be giving the value of the ship twice over, once in the capitalized value of the earnings of the ship, estimated at its present value, once as the extra expense incurred by the loss of the ship, which in my view is cured by giving the ship at the time of the loss its value at the time of the loss. If the owner says: "I have lost the ship, give me restitutio in integrum," the answer is: "You cannot have the ship back, it is lost, but you have 'its value to you as a going concern.' This restores you in integrum."

What then is to be done in this case? The registrar has given the owner a value of the ship, 9000*l.*—half as much again as her original cost to him at Patras, more than half as much again as her insured value. This seems to me an ample measure of the dredger's value as a going concern. If in addition the owner is given interest from the time of the loss till the date of judgment of the value, he is in my opinion replaced to his original condition; any further payment

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arises from circumstances which are too remote to be the direct and natural consequences of the loss; circumstances and profits which are, in the language of Bowen L.J., "uncertain and speculative and special profits."

As to costs, the defendants made no tender or payment into Court and must pay the costs of the reference. They must pay the assessed value of the *Liesbosch*, together with interest thereon at 5 per cent. from the time of loss to the date of judgment.

The defendants must have the costs of this appeal, and of the appeal to Langton J.

GREER L.J. In my judgment this appeal must be allowed, and judgment entered as hereinafter stated. With all respect to the learned registrar and the judge, I think they have misconceived and misapplied the rules of law as to the measure of damages recoverable. Their judgments appear to me to be based on the assumption that a plaintiff who has suffered injury by tort is entitled to recover all the damage he has in fact suffered, diminished only to the extent to which he could by reasonable steps reduce such damage In my opinion the true rule was as stated in his argument for the appellants by Mr. Dickinson. The damages recoverable in an action based on a tort whereby the owner of a chattel has been wholly deprived of it do not differ from the damages recoverable for breach of contract for non-delivery of a chattel, except that in the latter case they may be increased by the application of the second rule in *Hadley* v. *Baxendale*. (1) In *Cobb* v. *Great Western Ry. Co.* (2) Bowen L.J. states the law as follows: "The law is that the damages must be the direct and natural consequence of the breach of obligation complained of. The law is the same in this respect with regard both to contracts and to torts, subject to the qualification, that in the case of the former the law does not consider too remote damages which may be reasonably supposed to have been in the contemplation of the parties when the contract was made." See also the

(1) 9 Ex. 341. (2) [1893] 1 Q. B. 459, 464.

judgment of the same Lord Justice in *The Argentino*. (1) It is also well established that the principles which apply at common law to the measure of damage in cases of negligence, apply just as much to the ascertainment of damages for negligence in the Admiralty Court as they do in the King's Bench Division. In *The Argentino* (1) Bowen L.J. uses these words: "The damages recoverable from a wrong-doer in cases of collision at sea must be measured according to the ordinary principles of the common law. Courts of Admiralty have no power to give more, they ought not to award less. Speaking generally as to all wrongful acts whatever arising out of tort or breach of contract, the English law only adopts the principle of restitutio in integrum, subject to the qualification or restriction that the damages must not be too remote, that they must be, in other words, such damages as flow directly and in the usual course of things from the wrongful act:" and further on he also says: "The questions, therefore, to be inquired into are two: the first, to what extent, if any, the vessel has been thrown out of employment by the accident; the second, what would have been the fair earnings of a vessel such as the *Argentino* advertised to sail, as was the *Argentino*, on Messrs. Westcott & Laurence's line to Batoum, excluding, as I have said, everything in the nature of uncertain and speculative profits."

In *The Susquehanna* (2) Viscount Dunedin says: "There is no difference in this matter between the position in Admiralty law and that of the common law, and the common law says that the damages due either for breach of contract or for tort are damages which, so far as money can compensate, will give the injured party reparation for the wrongful act and for all the natural and direct consequences of the wrongful act"; and Lord Blanesburgh refers to the rule of the common law, "which must be followed in such matters." See also the speech of Lord Sumner in *The Amerika*. (3) If we apply in the present case, as we must, the rules of the common law applicable to damages occasioned

(1) 13 P. D. 191, 200, 202. (2) [1926] A. C. 655, 661, 669.
(3) [1917] A. C. 38, 61.

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by the plaintiffs being deprived by a breach of contract of the possession or use of a chattel, it seems to me that we must exclude from the computation all the losses which the plaintiffs sustained by reason of the fact that they were using and required their dredger for the purpose of performing a very special contract which they had made with the Port Commissioners of Patras.

The facts in *Hadley* v. *Baxendale* (1) are conveniently summarized in Mayne on Damages, 10th ed., at p. 10: "The plaintiffs owned a steam mill. The shaft was broken, and they gave it to the defendant, a carrier, to take to an engineer as a model for a new one. On making the contract, the defendant's clerk was informed that the mill was stopped, and that the shaft must be sent immediately. He delayed its delivery, and in an action for breach of contract the plaintiffs claimed as specific damages the loss of profits while the mill, as a result of delay, was idle." It was held that the defendant was not so liable, he not having been informed that a loss of profits would result from delay, or that the want of the shaft was the only thing that would keep the mill idle. It is quite clear in this case that the loss occasioned by the delay was the actual result of the delay in the circumstances in which the plaintiff was placed at the time of the breach of contract, and the case involves a decision that a result cannot be treated as a natural and direct result of the breach unless it is of a kind which would so result in the ordinary course of things. What is known as the rule in *Hadley* v. *Baxendale* (1) is laid down in these terms: "We think the proper rule in such a case as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be either such as may fairly and reasonably be considered arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable

(1) 9 Ex. 341, 354.

result of the breach of it." The second portion of the test has, of course, as Bowen L.J. pointed out in the case already mentioned, no bearing on damages for tort.

Applying this rule to the present case, I think it would exclude from consideration all the special damages claimed in respect of the loss occasioned to the plaintiffs by their inability to proceed with their contract, those being damages such as would not arise naturally according to the usual course of things from their being deprived of a dredger. This principle was applied in *Gee* v. *Lancashire and Yorkshire Ry. Co.* (1), to a case where a claim was made for damages for delay in the delivery of cotton to a cotton mill, which in the circumstances in which the owner was placed at the time resulted in his mill being idle until the cotton was delivered. It was held that the plaintiff's inability to run his mill, though in fact it was the result of the breach, was not either the natural result in the usual course of things, or such as might reasonably have been supposed to have been in the contemplation of the parties.

The common law case which seems to be nearest to the present case is *Horne* v. *Midland Ry. Co.* (2) The facts are sufficiently stated in the headnote in these words: "The plaintiffs, being shoe manufacturers at Kettering, were under a contract to supply a quantity of military shoes to a firm in London for the use of the French army at 4*s.* per pair, an unusually high price. The shoes were to be delivered by the 3rd of February, 1871, and the plaintiffs accordingly sent them to the defendants' station at Kettering for carriage to London in time to be delivered there in the usual course in the evening of that day, when they would have been accepted and paid for by the consignees. Notice was given to the station master (which for the purposes of the case was assumed to be notice to the company) at the time that the plaintiffs were under a contract to deliver the shoes by the 3rd, and that unless they were so delivered they would be thrown on their hands; but he was not informed that there was anything exceptional in the character of the contract. The shoes were

(1) 6 H. & N. 211. (2) (1873) L. R. 8 C. P. 131, 140.

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not delivered in London till the 4th of February, and were consequently not accepted by the consignees, and the plaintiffs were obliged to sell them at 2*s.* 9*d.* a pair, which, in consequence of the cessation of the French war, was, apart from the previously-mentioned contract, the best price that could have been obtained for them, even if they had been delivered on the evening of the 3rd of February, instead of the morning of the 4th." The defendants paid into Court a sum which was sufficient to cover any loss which would occur in the ordinary course of things, but the plaintiffs further claimed the loss they had sustained by their inability to use the goods for the purpose of implementing their contract for shoes to be used for the French army. It was held by the majority of the Court that this was not recoverable, as it was not such damage as might reasonably be considered as arising naturally from the defendants' breach of contract. Lord Blackburn (then Blackburn J.), in the course of his judgment, says: "If a man contracts to carry a chattel and loses it, he must pay the value though he may discover that it was more valuable than he had supposed. But when the damages sought to be recovered are not those which in the ordinary course of things would naturally arise, but are of an exceptional nature, arising from special and peculiar circumstances, it is clear that in the absence of any notice to the defendant of any such circumstances such damages cannot be recovered."

It is to be observed that in all these cases the damages which were sought to be recovered, and were disallowed, were damages which in fact the plaintiff suffered in the circumstances in which he was in fact placed at the time when the wrongful act was committed which deprived him of the use of his chattel, but it was held that, as those damages were of an exceptional nature arising from special and peculiar circumstances, they were not recoverable. It seems to me that all the damages claimed by the plaintiffs arising out of the hindrance occasioned to them by the loss of their dredger in performing their contract with the Patras Port Commissioners were, to use the words of Lord Blackburn, "of

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an exceptional nature arising from special and peculiar circumstances," and they are irrecoverable in an action of tort, and would only be recoverable in an action for breach of contract if the party breaking the contract had notice at the time of the contract that such damages would be the probable result of a breach.

So far I have dealt only with the cases at common law. I do not think there is anything in the decisions in the Admiralty Court inconsistent with the rule in *Hadley* v. *Baxendale.* (1) If a shipowner be deprived of a ship which has a special value to him because he has got the benefit of a charter at a good rate of freight, and is not entitled to substitute another vessel to perform that charter, the damage which he suffers by losing his ship, and therefore losing his charterparty freight, is damage which arises naturally in the usual course of things, because it is the usual course of things for vessels to be chartered. The vessel's engagements at the time of the loss are part of the value of that vessel to the owner. In the strict sense of the words a vessel like a dredger has not got a market value. You cannot go into the market on any day and buy an exact substitute for it, especially if you lose it when it is in the middle of the Mediterranean Sea. If a seller of goods which cannot be obtained in the market fails to perform his contract, the buyer may use a sub-contract of sale which he has made at an enhanced price as evidence of the value to him of the article which by the seller's breach of contract he has been deprived of: see *Borries* v. *Hutchinson.* (2) It is clear that if a vessel which has been destroyed or delayed by the negligence of a defendant is under charter, what it would earn under the charter may be taken into account in estimating the loss occasioned to the owner by the temporary or permanent loss of his vessel: see *The Philadelphia* (3) and *The Argentino.* (4) It seems to me that the right way of estimating the damages in this case is that the tribunal should ascertain the value to the owner of his vessel at the

(1) 9 Ex. 341.
(2) 18 C. B. (N. S.) 445.
(3) [1917] P. 101.
(4) 14 App. Cas. 519.

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date of the loss, taking into account that it is a tool of his trade ordinarily used for the purposes of profit, and taking into account, if such be the fact, the existing engagements of the owner with respect to the particular vessel, but excluding, to use the words of Bowen L.J., "everything in the nature of uncertain and speculative profits." The above method of estimating damages was the one which I think was used by Gorell Barnes J. in *The Harmonides* (1), and by Sir Francis Jeune in *The Kate* (2), and the one which ought to have been adopted in the case under appeal. I do not think there is anything in *In re Polemis & Furness, Withy & Co.* (3) inconsistent with the above view. That case was concerned with the direct consequences of the wrongful act which occurred immediately after the act of negligence complained of. It was not concerned with conse quences arising out of contracts made by a shipowner of a special nature giving rise to uncertain and speculative profits.

In my judgment the plaintiffs will be adequately compensated, in accordance with the rules of law applicable to their claim for damages, if they receive the sum of 9000*l.* as the value to them of the dredger at the date of its loss, together with interest at 5 per cent. to the date of judgment. I think the appeal should be allowed, the judgment set aside, and judgment entered for the sum arrived at by adding to the 9000*l.* 5 per cent. interest up to the date of judgment, and that the appellants should be allowed their costs of the appeal to the judge, and of the appeal from the judge to this Court.

Where I think the learned judge missed his true course in his very breezy judgment was that he paid no attention to the two principles which I have stated in the early part of this judgment, and seems to have thought that in questions relating to the measure of damage the Admiralty Court might pursue a course of its own.

SLESSER L.J. I have read the judgments of Scrutton and Greer L.JJ. in this case. I agree with their conclusions and

(1) [1903] P. 1. (2) [1899] P. 165.
(3) [1921] 3 K. B. 560.

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the reason for those conclusions by them stated, which I do not repeat.

In my opinion, it is impossible to say, in the circumstances of this case, that more should be taken into account than the direct, natural and unexceptional consequences of the defendants' wrongful acts; that is the actual value to the plaintiffs of the dredger as such at the date of its loss, together with interest, as stated by Scrutton L.J. The appeal consequently must be allowed on the terms stated.

Solicitors for the appellants: *Thomas Cooper & Co.*
Solicitors for the respondents: *Wm. A. Crump & Son.*

E. C. M. T.

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## COOPER *v.* COOPER AND FORD.

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*Feb.* 29.

*Divorce—Guilty Wife—Post-nuptial Settlement—Deed of Separation—Variation—Dum sola et casta vixerit—Application for Maintenance distinguished from Variation of Settlement—Matrimonial Causes Act,* 1859 (22 *&* 23 *Vict. c.* 61), *s.* 5—*Matrimonial Causes Act,* 1878 (41 *Vict. c.* 19), *s.* 3—*Supreme Court of Judicature (Consolidation) Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 192.

In the application of settled property under the Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 192, on a decree obtained by a husband for divorce, the Court will not deal with the question as one of maintenance for a guilty wife, which ordinarily it will not order, but will consider all the circumstances of the case, what alteration (if any) should be made in the existing provision for the wife, and under what limitations it should be payable in future.

HUSBAND'S PETITION for divorce.

CROSS MOTIONS to confirm and to vary the registrar's report on a petition to vary a settlement.

The parties were married on November 22, 1913. On May 30, 1925, they entered into an agreement for separation by which the custody of the two children of the marriage was committed to the wife, the present respondent, and the husband covenanted to pay her the sum of 1*l.* 15*s.* weekly for her

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life for her own support and that of the children. On May 15, 1930, a decree nisi was pronounced dissolving the marriage on the ground of the adultery of the respondent with the co-respondent Ford, giving the legal custody of the survivor of the two children to the petitioner, but leaving its physical custody with the respondent, as under the deed. The decree having been made absolute, on July 15, 1931, the Court of Appeal made an order giving to the petitioner legal custody of the surviving child, but directing it to be sent to school at the cost of a third intervening party and to spend half the school holidays with each parent.

The petitioner filed a petition dated October 30, 1931, praying for the variation of the separation agreement as a settlement under the powers of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 192, by cancelling or varying the covenant by the petitioner to pay the allowance. The registrar reported on the petition that the respondent had no means and that the petitioner earned in the previous year 185*l.*, and was in receipt of 50*l.* per annum from investments. The registrar submitted that the separation agreement should be cancelled and that a payment to the respondent should be provided for by the Court in respect of any period when the child should be with her.

*Noel Middleton* for the respondent. The question has been treated by the registrar as one of maintenance. He has accordingly disallowed maintenance to a guilty wife; but the annuity under the deed is settled property: *Jump* v. *Jump*. (1) In dealing with property already settled under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 192, which re-enacts the Matrimonial Causes Act, 1859, s. 5, and the Matrimonial Causes Act, 1878, s. 3, and from which the Court derives its only power to deal with settled property, it is not the practice to strip a guilty respondent of all interest in a settlement: the circumstances of the case must be considered: *Clifford* v. *Clifford* (2); *Ollier* v. *Ollier*. (3) It

(1) (1883) 8 P. D. 159. (2) (1884) 9 P. D. 76, 80.
(3) [1914] P. 240.

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may be that a dum sola et casta term should be imposed, but that does not affect the principle, which is that the annuity is not to be treated as alimony or an allowance which may or may not be ordered, but as property already settled.

[THE PRESIDENT (LORD MERRIVALE) referred to the judgment of Fry L.J. in *Clifford* v. *Clifford*. (1)]

*R. Bush James* for the petitioner. This is not the case of a destitute wife, as was *Ollier* v. *Ollier*. (2) At the date of the agreement the petitioner was better off.

*Noel Middleton* in reply.

THE PRESIDENT (LORD MERRIVALE). The amount of the annuity settled will be reduced to 12*s*. 6*d*. per week and limited dum sola et casta.

Solicitors for the petitioner: *Indermaur & Brown, for Cliffords, Derby.*

Solicitors for the respondent: *Haslewood, Hare & Co., for E. J. Watson & Co., Bristol.*

(1) (1884) 9 P. D. 76, 80. (2) [1914] P. 240.

R. M. M.

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April 26, 27.

## THE TORNI.

*Shipping—Carriage of Goods—Bills of Lading—Palestine Carriage of Goods by Sea Ordinance, No. 43 of 1926—Hague Rules—Conflict of Laws.*

Certain parcels of oranges were shipped at Jaffa upon an Esthonian steamship for carriage to Hull. The ship was under time-charter to a British firm, who ran a line of steamships called the Jaffa Union Line. The bills of lading, which were signed by directors of a Palestine corporation, the Jaffa Union Line, Ld., contained the following clause: "This bill of lading wherever signed is to be construed in accordance with English law."

The plaintiffs were Hull fruit merchants, two of whom were indorsees of certain of the bills of lading and sued as owners of the cases of fruit therein mentioned; nine others had merely paid the freight and sued on an implied contract with the defendant shipowners to deliver the cases in good order and condition according to the terms of the bills of lading.

The Palestine Carriage of Goods by Sea Ordinance, No. 43 of 1926, incorporated the rules relating to bills of lading adopted by the International Conference on Maritime Law held at Brussels in 1922-23, generally known as the Hague Rules. Clause 4 of the Ordinance was in the following terms: "Every bill of lading . . . . issued in Palestine which contains or is evidence of any contract to which the Rules apply shall contain an express statement that it is to have effect subject to the provision of the said Rules as applied by this Ordinance, and shall be deemed to have effect subject thereto, notwithstanding the omission of such express statement."

The plaintiffs' action was in respect of damage and/or short delivery. The defendants set up various exceptions in the bills of lading, and the plaintiffs pleaded in reply that the contracts were governed by the Palestine Ordinance; that accordingly, notwithstanding the omission of a statement to that effect, the Hague Rules should be deemed to be written into the contracts, and, therefore, that the exceptions relied on were of no avail. The question whether the bills of lading were subject to the provisions of the Ordinance was set down for trial as a preliminary issue.

Langton J. held, that they were so subject, and that all the plaintiffs were entitled to succeed on the preliminary issue. The defendants appealed:—

*Held*, (i.) that the express terms of the Ordinance, based on an international convention, could not be defeated by the insertion of a clause in the bills of lading that they were to be construed according to English law, and that the bills of lading were subject to the provisions of the Ordinance and the Rules thereunder, and, with those terms read into them, should then be construed according to English law; but, (ii.) that the Court had not sufficient information as to the facts to determine the effect of that decision on the nine plaintiffs who sued on implied contracts, and that, while the appeal would be dismissed, the judgment must be varied to that extent.

Judgment of Langton J., ante, p. 27, affirmed on the main issue.

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APPEAL from a judgment of Langton J. on a preliminary point of law in an action in respect of damage to and short delivery of cargo. The question for decision was whether certain bills of lading were subject to the provisions of the Government of Palestine Carriage of Goods by Sea Ordinance, 1926. The facts are summarized in the headnote and will be found fully set out in the learned judge's judgment, ante, pp. 33–35, and the material clauses of the Palestine Ordinance, ante, p. 28.

*W. Norman Raeburn K.C.* and *Sir Robert Aske* for the appellants. The learned judge based his judgment largely on the proviso in the Ordinance that every bill of lading issued in Palestine must contain the Rules, and that they will be deemed to have effect notwithstanding their omission from a bill of lading, so that it would be illegal to contract out of them. That view, however, really begs the question, for it is not disputed that, if the law of Palestine applies, the Ordinance and the Rules apply. The fallacy in the judgment is that it is illegal to make a contract for the carriage of goods by sea from Palestine not subject to the Rules. There is a wide distinction between an illegal and a void contract; and this contract, as a whole, would not even be void in Palestine, for the Court there would read the Rules into the contract. The Ordinance merely makes it void and useless according to Palestine law for parties to issue bills of lading not subject to the Rules; there is no penalty as in the New Zealand Ordinance or the Harter Act of the United States, which imposes a fine of $3000. But even in the case of the Harter Act an English Court will only enforce its provisions if incorporated in the contract, or if the parties intended to be governed by American law: *Dobell & Co.* v. *Steamship Rossmore Co.* (1) Here the parties have said in terms that the contract is to be construed according to English law, and that is the best possible evidence of their intention: *Hamlyn & Co.* v. *Talisker Distillery* (2); *The Adriatic* (3), and the cases there cited. The observations

(1) [1895] 2 Q. B. 408, 413. (2) [1894] A. C. 202.
(3) [1931] P. 241.

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of Lord Halsbury in *In re Missouri Steamship Co.* (1) are in the appellants' favour. When he mentioned contracts which would be held void all over the world he was assuming a whole contract contrary to positive law or morality. The present contract is not contrary to positive law; it is very similar to the contract made by the parties in the *Missouri* case (2) and upheld by the Court of Appeal, although it was invalid by the law of the State when the cargo was shipped, and where the bills of lading were signed, given and accepted: see also *Jones* v. *Oceanic Steam Navigation Co.* (3) There is no authority for the statement in Temperley's Carriage of Goods by Sea Act, 1924, 3rd ed., p. 83, that "British Courts will presumably apply in all cases to which it may be by its terms applicable any enactment of any British Dominion, Colony or Protectorate . . . ." Further, Palestine does not come under any of those descriptions, nor was Palestine a party to the Brussels Convention.

At any rate as regards the nine plaintiff firms who are not suing on the bills of lading, the Court cannot introduce implied terms into their contract, for they were not parties to the contracts made in Palestine.

[SCRUTTON L.J. We are all of opinion that we cannot decide this second point. We are not in possession of the facts.]

[Reference was also made to *Ralli Bros.* v. *Compañia Naviera Sota y Aznar* (4); *In re Mahmoud and Ispahani* (5); *Boucher* v. *Lawson* (6); Salmond on Contracts, p. 541; and Scrutton on Charterparties and Bills of Lading, 13th ed., appendices iii., iv., vi. and vii.]

*van den Berg K.C.* and *Cyril Miller* for the respondents were not called on.

SCRUTTON L.J. If I were called upon to decide all the questions that have been argued in this case I should certainly desire to hear Mr. van den Berg, and should very

(1) (1889) 42 Ch. D. 321, 336.
(2) 42 Ch. D. 321.
(3) [1924] 2 K. B. 730.
(4) [1920] 2 K. B. 287.
(5) [1921] 2 K. B. 716.
(6) (1735) Cas. t. Hardw. 85, 194.

likely take time to consider my judgment. But in my view the part of this case that I am going to decide can be put on very short grounds.

The owners of a cargo of oranges, not specified in the writ according to the practice of the Admiralty Court, brought an action against the owners of an Esthonian ship, the *Torni*, for damages to certain oranges alleged to be in breach of the bills of lading. The plaintiffs themselves have alleged that two plaintiffs, whose names are given, were owners of oranges to whom the property passed upon the indorsement of the respective bills of lading. Nine other firms who were also plaintiffs took delivery of certain cases of oranges specified under bills of lading "held by them"—a very ambiguous statement, there are all sorts of cases held by them—and these bills of lading, according to the statement of claim, they "presented to the defendants and paid the freight due under such bills of lading respectively." The bills of lading themselves are in a most ambiguous and embarrassing form, and are dealt with in such a way that the Court cannot tell by looking at them what happened.

[His Lordship then referred to some of the bills of lading and the names appearing on them, and said that it was not clear on the face of any of the bills what exactly had happened or what was meant by "held by them," and that under those circumstances he declined to decide anything as to the position of the larger group of plaintiffs. His Lordship continued as follows:] I propose only to decide the question which I understand is directly raised by the order that has been made. I think it is a pity the order was made; because what may happen in this case is what has happened recently in other cases: the parties may go to the Lords, the Lords may decline to decide the question at all, and it will be sent back for hearing more than two or three years after the cargo arrived, and when everybody has either forgotten about it, or several of the most important witnesses are dead or have disappeared. Preliminary questions of law may be ordered to be stated in a way such as seriously to embarrass the

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trial of the action. However, here is the order, and the judge has dealt with the part of it I am going to decide, and therefore I deal with it, but I regret that the order was ever made.

We are asked whether the bills of lading are, as between the parties to the action, subject to the provisions of the Government of Palestine Carriage of Goods by Sea Ordinance. The question begins with a Convention at Brussels (1), signed by a number of people with certain reservations to which I will refer. Art. 10 of that Convention, which draws up a code of Rules to be embodied in bills of lading, is as follows: "The provisions of this Convention shall apply to all bills of lading issued in any of the contracting States." We go on, because one wants to know who are the contracting States. Art. 12: "Non-signatory States may accede to the present Convention whether or not they have been represented at the International Conference at Brussels." Art. 13: "The high contracting parties"—which includes His Majesty—"may at the time of signature, ratification or accession declare that their acceptance of the present Convention does not include any or all of the self-governing dominions, or of the colonies, overseas possessions, protectorates or territories under their sovereignty or authority"; and that may raise a nice question whether a mandated territory is a possession under the authority of the King. I do not know whether the people who framed this question thought the Court would decide anything about that. It does not stop there. His Britannic Majesty affixed a reservation to his signature: "I further declare that my signature applies only to Great Britain and Northern Ireland, I reserve the right of each of the British Dominions, Colonies, Overseas Possessions, and Protectorates, and of each of the territories over which His Britannic Majesty exercises a mandate"—the people who drew that up did know about Palestine—"to accede to this Convention under

(1) International Convention for the unification of certain Rules of Law relating to Bills of Lading. Brussels, August 25, 1924. [Treaty Series, No. 17 (1931).]

Article 13." The Palestine Ordinance provides as follows: "WHEREAS a Convention for the unification of certain Rules relating to bills of lading was adopted by the International Conference on Maritime Law held at Brussels in 1922 and 1923. *And whereas* it is expedient that the Rules of the Convention, as set out in the Schedule to this Ordinance, should, subject to the provisions hereof, be given the force of law in Palestine," etc. Whether the Government of Palestine sent a notice of that to the Government at Brussels the parties have not informed us.

It is quite clear, however, that the Government of Palestine has intended to accede to the Convention and adopt the Rules laid down by the Convention. England has adopted the Rules by the Carriage of Goods by Sea Act, 1924. Palestine, being a mandated territory under the King, has adopted the Rules by the Ordinance. Palestine has gone rather further than England. Palestine has inserted this clause: "Every bill of lading or similar document of title issued in Palestine" —this bill of lading was issued in Palestine—"which contains or is evidence of any contract to which the Rules apply shall contain an express statement that it is to have effect subject to the provisions of the said Rules . . . ." The people who drew up these bills of lading have disobeyed that law and have not included, as they are told to in the Ordinance, an express statement that it is to have effect subject to the provisions of the said Rules. The Government of Palestine have anticipated that people in Palestine might disobey the law, and so they have added the following words: "and shall be deemed to have effect subject thereto, notwithstanding the omission of such express statement." Palestine, therefore, has endeavoured to carry out and reduce to law the Convention, to which England and Palestine agreed, that all bills of lading wherever signed shall include what used to be known as the Hague Rules and are now known as the Rules in the Schedule. It has occurred to the parties here that they might upset the whole applecart—if I may use a conventional expression—of the countries who have agreed to the Rules, by simply putting in a clause into their

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bills of lading, as they have done: "This bill of lading wherever signed, is to be construed in accordance with English law." If that has the effect of striking out the whole of the Schedule, it will be quite simple for every shipowner to defeat the Convention and the whole system under it by simply putting in a clause: "This bill of lading is to be construed by the law, not of the place where it is made, but by the law of the place to which the ship is going."

It will take very strong evidence to convince me that such a clause has that meaning. I read the effect of the Palestine Ordinance as this: in every bill of lading, whether stated or not, these terms of the Schedule, the Hague Rules, are to be included as part of the terms. Consequently, when I come to construe this bill of lading I read into it those terms. I give perfectly sufficient effect to the clause about English law, if it has any effect, by saying: "Yes, here is the bill of lading with those terms in it. Now construe it according to English law." If English law were faced with the same question on a bill of lading signed in England with a clause: "This bill of lading is to be construed in accordance with Palestine law," I have no doubt that the English Courts would hold that they had to construe the bill of lading containing, in compliance with the English statute, the Rules in the Schedule, according to Palestine law. I think exactly the same result follows if you turn it round and sign the bill of lading in Palestine, where it has to comply with Palestine law, and construe it according to the law of England.

For these reasons, I think, without going into all the reasons that he gives, that the result at which the learned judge arrived is correct. In my view most of the cases cited have nothing to do with the question. I do not think that any case has raised this sort of point before. Certainly *In re Missouri Steamship Co.* (1) does not seem to me to have raised it. The *Missouri* case (1) was this: There was a bill of lading signed in Massachusetts, with a printed clause in it which the Courts of Massachusetts would declare to be void as contrary to public policy. Inasmuch as public policy

(1) 42 Ch. D. 321.

differs in various countries, and the United States think that the negligence clause is contrary to public policy, whereas the English Courts do not so regard it, the English Courts do not take public policy into account when they come to interpret that document, and do not strike the clause out of the bill of lading, because their view of public policy differs from the view taken in the United States Courts. But it is quite a different thing when you have a question, not of following a clause in that bill of lading, but a question of trying to strike out a clause which the law of the place says shall be incorporated in every bill of lading made in that country.

For these reasons, limiting the answer which I give to the main part of the question, I answer that the bills of lading are subject to the provisions of the Government of Palestine Carriage of Goods by Sea Ordinance Act, and that the Rules are included in the bills of lading. I decline to go further and answer the question what the effect of that is on the larger body of people who allege that they took delivery and paid the freight, because there are no facts which enable me to decide in what relation those people stand to the property and to the conveying. The appeal must be dismissed with costs.

GREER L.J. I agree. The terms of the Ordinance strictly and literally interpreted seem to apply if the question is asked not only with regard to the contracts contained in the bills of lading of which two of the plaintiffs are assignees and in the same position as the original contractors to the bills of lading, but also to the other parties who do not appear to have been assignees of the bills of lading and the contract therein contained, but between whom and the ship the contract has to be implied out of the circumstances under which they came to present the bills of lading and pay the freight. I think, however, we ought not to decide, notwithstanding the wise words of the Ordinance, what the effect is of the implied contract made with these latter parties. It may be that in some of these instances the persons coming to pay were the agents of the shippers and were therefore, as between them

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and the ship people on whom the whole of the contract made under the bills of lading and the other considerations which applied to the contract in Palestine, had effect. It may be, on the other hand, that different considerations might apply to them if they were mere strangers to the original transaction ; and the only materials on which it can be determined what the contract between them and the ship was, arise out of the fact that they came with a bill of lading, a written document, in England, and said to the ship : "Deliver us these goods on the terms of this document." That may prove to be a difficult question which possibly may never arise, and which can only be determined when the facts of the case are fully proved ; and I think it is a question that ought not to be determined as a preliminary point upon these pleadings. I direct my attention solely to the question whether, as against the people to whom the property passed under the bills of lading, the terms of the Palestine Ordinance are to be read into the contract contained in those bills of lading, i.e., the contract made by the shippers at the port of shipment.

In 1923, as the result of various conferences between representatives of shipping firms and representatives of merchants, a Convention was arrived at with the laudable object of securing a certain amount of uniformity in the contracts of carriage which were made by bills of lading. That uniformity is desirable was universally admitted, though the result of uniformity and the creation of a statutory form may be in some respects to restrict the freedom of contract. That is of very little importance compared to the advantages obtained when you get a position created by law in which people without much investigation can know what rights are undertaken by a ship with regard to the goods which are carried. So long as there is no dictation as to the rate of freight the freedom of contract remains, because if the shipowner thinks that he is undertaking liabilities, by reason of the statutes passed in the various countries, that put a burden upon him which he was not under before, he can rectify that difficulty by a small addition to the freight.

The restriction of the freedom of contract is of much less importance now than it was in the old days, because the question which both parties have to face is merely which party, the shipper or the shipowner, is to pay the premium to insure the goods for the voyage. Now I read the Ordinance as meaning this: para. 4 in my judgment contains an imperative order to those who are making contracts for the shipment of goods from Palestine to this country to insert in a contract made by bill of lading, or similar document, an express statement that it is to have effect subject to the provisions of the Rules which are stated in the Ordinance, and any shipper and any master of a ship who contravenes that order is doing something which by the law of Palestine is illegal. But in order to prevent that illegality from having the effect of entirely destroying the contract of carriage between the parties, those who drew up this Ordinance wisely added a provision that, though there has been disobedience to the first part of para. 4 and the contract does not contain the express statement provided for, the contract shall be deemed, notwithstanding the omission of such express statement, to have effect subject to the Rules. I find some difficulty in supposing that under those circumstances the shippers of these goods and the agents of the ship in Palestine did not make a contract which contained the provisions of the Ordinance. I think it is clearly established that making their contract as they did, subject to the laws which prevailed in the country where they made it, they made it just as much subject to the Rules contained in the Ordinance as if they had expressed it so in the document; and if they had expressly stated so in the document the provision in the contract that the contract should be construed in accordance with the laws of this country would not have eliminated those terms from the contract, but would have only directed the parties and the Courts in this country to construe the words of the Ordinance according to the rules of construction prevailing in this country.

I agree with my Lord that there are no authorities which prevent this Court from coming to the conclusion that they

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have done. The only case that is anywhere near this is *In re Missouri Steamship Co.* (1), which has been much discussed in the course of the argument. That was a case where, in accordance with the laws of Massachusetts, the terms of a contract of carriage which relieved the carrier from liability for the negligence of his employees was void by the law of Massachusetts. There was nothing in the law of Massachusetts to say that it was illegal, or that if it was not put in the contract it should be deemed to be in the contract made within Massachusetts territory, and there are observations made by Lord Halsbury and other members of the Court of Appeal which make it clear that in their judgment they were not deciding that, if a term in the contract was illegal by the law of the place where it was made, this country would fail to recognize that illegality. On the contrary, I regard the decision as meaning that if, in the country where the contract was made, the contract was illegal—not merely void and unenforceable, but illegal—then the Courts in this country would recognize the illegality and act in accordance with the law of the country where the contract was made. That being so, I do not regard that case as any authority contrary to the view we are expressing in the present case, because in my judgment, apart from the statutory correction of the illegality, the contract, if it did not contain these terms, would have been by the law of Palestine an illegal contract.

For these reasons, without referring at any greater length to the principles of law which have been under discussion, I think the learned judge was right. We are indebted to Sir Robert Aske for a clear and unambiguous argument. Where I differ from his argument is this: his argument treated the Ordinance as if it were a mere statement that the omission of the clause in the document would be null and void. I treat it as a statement that it would be illegal not to put it in, and that whether it is put in or not, it is there in the contract. If that is right, that determines this appeal. I agree with my Lord that it would be extremely

(1) 42 Ch. D. 321.

unfortunate if the result of this case were to be, as it would be, to bring to nought the attempt that has been made by means of the Conventions with various countries, to secure a more or less uniform bill of lading to be recognized by one country in regard to the goods shipped from that country, and by the other party to the Convention with regard to the goods shipped from his country. I am not persuaded by the argument that we are bound to bring this Convention to the unfortunate nullity that would come upon it if we decided this case otherwise than in the way we are deciding it, and I agree that this appeal should be dismissed with costs.

SLESSER L.J. In this appeal a conflict arises in the following way. In the bill of lading under consideration it is provided that wherever signed it is to be construed in accordance with English law. The bills of lading were in fact signed at Jaffa, and therefore, being signed outside the United Kingdom, would not be covered by the Carriage of Goods by Sea Act, 1924. But in Jaffa, which is within the mandated territory of Palestine, there is an Ordinance which substantially applies the provisions of the Carriage of Goods by Sea Act, and substantially carries out the results of the International Conference at Brussels in 1922–23. The question we are asked is this: if the bill of lading is stated to be construed in accordance with English law, has it to be construed subject to that Ordinance or not?

The Ordinance provides in cl. 4 that: "Every Bill of Lading or similar document of title issued in Palestine which contains or is evidence of any contract to which the Rules apply shall contain an express statement that it is to have effect subject to the provisions of the said Rules." The Rules are contained in the Schedule to the Ordinance entitled "Rules relating to Bills of Lading"; and in rule No. 8 of art. 3 it is provided that "Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the

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duties and obligations provided in this Article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect." The first question which I ask myself is this: whether cl. 4 of the Ordinance which so applies r. 8—the rule here most material—is or is not a provision merely that a contract not containing such provisions shall be void, or whether it contains an express prohibition of the issue of a bill of lading otherwise than in accordance with cl. 4 and the Rules thereby applied? In my opinion it is clear beyond any doubt that the first limb of cl. 4 does contain an express prohibition and an express mandate that the bill of lading shall take a particular form. The language is: "Every bill of lading . . . . shall contain an express statement." Now Sir Robert Aske has argued that that provision cannot be regarded as a prohibition within the meaning of the observations made by Lord Halsbury in *In re Missouri Steamship Co.* (1), because there is no penalty attached to the disobedience of the mandatory provision. In my view that is not at all conclusive of the matter. Had this provision been contained in the English statute I entertain no doubt that in the absence of express penalty where some one was in terms by statute in a public matter required to do a certain act, or if the act were to be done, to do it in a certain way, that if that person failed to obey that statute, the act done would be in contempt of the statute, and therefore, though there were no express penalty provided, the ordinary common law rules would apply. In such case, the matter being one of public obligation and the act done in contempt of the statute, in an appropriate case the remedy would lie for misdemeanour. The matter is thus stated in Hawkins' Pleas of The Crown, Bk. 2, ch. 25, sect. 4: "It seems to be a good general ground, that wherever a statute prohibits a matter of public grievance to the liberties and security of a subject, or commands a matter of public convenience, as the repairing of the common streets of a town, an offender against such statute is punishable, not only at the suit of the party aggrieved, but also

(1) 42 Ch. D. 321, 336.

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by way of indictment for his contempt of the statute, unless such method of proceeding do manifestly appear to be excluded by it." That doctrine has been applied in several cases, two only of which I will cite. The first is *The Queen* v. *Price* (1), where a person apparently innocently failed to inform the registrar of particulars regarding the birth of a child. On being requested to furnish the information he refused, and it was held that he was indictable for a misdemeanour. In that case, of course, the original innocence was at an end after the matter had been pointed out to him. The indictment was on the refusal, and there was no penalty attached in express terms. The second case is *Reg.* v. *Hall* (2), where the passage I have read in Hawkins' Pleas of The Crown is cited with approval. I think therefore, had the matter fallen for consideration within the realm, the mere absence of a penalty, on which Sir Robert Aske relies, would not in itself in any way have militated against the mandatory provision being deemed to be illegal; and it is a general rule of law that in the absence of evidence to the contrary one must assume that the foreign law is the same as the English. Indeed it is almost inconceivable that where in any State a statute or an Ordinance requires something to be done, the mere absence of an express penalty mentioned would destroy the sanction of the obligation which the sovereign authority sought to impose upon the subject.

Had the matter rested at the end of the first limb of cl. 4 I think it is clear that the obligation is mandatory and express. But the clause goes on to say "and shall be deemed to have effect subject thereto, notwithstanding the omission of such express statement," and I do not think those words, which strengthen the force of the Ordinance, make the obligation under the bill of lading less mandatory. I think to that extent the case does fall directly within the compass of the observations of Lord Halsbury in the *Missouri* case (3), where he says: "Where a contract

(1) (1840) 11 Ad. & El. 727. (2) [1891] 1 Q. B. 747.
(3) 42 Ch. D. 321, 336.

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is . . . . contrary to such positive law as would prohibit the making of such a contract at all, then the contract would be void all over the world, and no civilised country would be called on to enforce it." Here we are not concerned with the whole contract, but with the introduction of a particular term; and I would therefore add the observation which has been cited to us from Salmond on Contracts that the matter may be regarded as a question whether the exclusion or insertion of a particular obligation is or is not contrary to the comity of nations. I find it very difficult to think that where there has been an international Convention to which various nations have agreed, it would not be contrary to the comity of nations not to give force to these provisions and allow particular individuals to make a special provision for themselves and contract out of the international obligation and agreement. However that may be, and that point may assume greater importance as more and more international Conventions are carried out, I am prepared to found my view on the assumption that this provision was expressly provided. If that be so—if the bills of lading were drawn otherwise than in accordance with the Ordinance—then by virtue of cl. 4 and s. 8 the words must be read into the contract and the contract construed in accordance with English law. I think the learned judge was right in the answer which he gave to that part of this case which alone we have to consider, because I agree with my Lords that the question of the respective liabilities of the various plaintiffs cannot here be decided, as we have not the necessary materials on which to decide it. I agree therefore that this appeal must be dismissed.

*Sir Robert Aske.* Will your Lordships vary the order of the learned judge as regards the point your Lordships have not decided?

SCRUTTON L.J. We think the judge had no materials before him as regards the larger body of plaintiffs on which

to decide the matter, and his order will be varied by confining it to the two plaintiffs who were indorsees. C. A. 1932

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*Appeal dismissed.*

Solicitors for the appellants: *Botterell & Roche.*

Solicitors for the respondents: *Pritchard & Sons, for Andrew M. Jackson & Co., Hull.*

E. C. M. T.

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## *In the Goods of* BOWKER.

1932 *March* 14.

*Probate—Practice—Words of Will of no dispositive effect or personal allusion —Omission from Probate.*

The Court will permit words of a will which are not dispositive to be omitted from the probate, though they make no personal allusion to any individual, if they are otherwise offensive and objectionable and repugnant to the members of the family of the testator.

MOTION by an executor to omit from the probate of his testator's will words having no dispositive effect.

The testator died on November 9, 1931, leaving a will dated January 20, 1928. The words in question related solely to the mode of disposal of the bodily remains of the testator, and made no personal allusion to any individual.

The applicant sought the exclusion of the words from the probate of the will on the grounds stated in the affidavit in support of the motion—namely, that the words were "offensive and objectionable and repugnant to the members of the deceased's family and unless omitted would be broadcast in the Press and particularly in the locality where the deceased was well known and where the deponent and other members of the family lived."

*T. Bucknill* in support of the motion.

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BOWKER, *In the Goods of.*

The Court (THE PRESIDENT, LORD MERRIVALE) made an order excluding from probate certain directions as to the disposal of the remains of the testator and his funeral.

Solicitors: *Bowkers.*

NOTE BY REPORTER.—No authorities were cited, but a perusal of the following authorities from 1825 onwards shows the course of practice of the Court as to allowing the omission from probate of non-dispositive words in a will which are of an objectionable character.

*Curtis* v. *Curtis* (1825) 3 Add. 33.
*In the Goods of Wartnaby* (1846) 1 Rob. 423.
*Marsh* v. *Marsh* (1860) 1 Sw. & Tr. 528, 536.
*In the Goods of Honywood* (1871) L. R. 2 P. & M. 251.
*In the Estate of White* [1914] P. 153.
*In the Estate of Heywood* [1916] P. 47.
*In the Estate of Caie* (1927) 43 Times L. R. 697.

R. M. M.

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1932
*April* 6.

## SIMCOCK *v.* SIMCOCK.

*Husband and Wife—Summary Jurisdiction (Separation and Maintenance Acts,* 1895 (58 *&* 59 *Vict. c.* 39, *s.* 4) *to* 1925 (15 *&* 16 *Geo.* 5, *c.* 51)*—Persistent Cruelty—Assault after Termination of Marital Cohabitation.*

Although the operation of the Summary Jurisdiction (Separation and Maintenance) Acts deals with and is limited to the relations of husband and wife, an act of violence committed by a husband against his wife after he has ceased to cohabit with her may amount to conduct on his part which can be taken into consideration together with his previous conduct as constituting the offence of persistent cruelty within the meaning of the Acts.

APPEAL of the husband T. B. Simcock from the order of a court of summary jurisdiction finding him guilty of persistent cruelty to his wife, C. E. Simcock.

According to the evidence given before the court of summary jurisdiction the husband assaulted his wife in June, 1931, after she had objected to his association with another woman. He told her to go. She did so, and in August took out a summons under the Summary Jurisdiction Act for desertion. This was dismissed. A second assault took place in October, 1931, when the wife found the husband in the

company of the other woman under circumstances suggesting immorality. On November 23, 1931, two summonses taken out by the wife came on for hearing before the same court of summary jurisdiction (*a*) for persistent cruelty and (*b*) for neglect to maintain. The order appealed from was made on the first of these summonses. By it a weekly payment of the husband to the wife of 15*s.* was ordered, with a non-cohabitation proviso. The second summons was dismissed.

*E. T. Nelson* for the appellant. There was no conduct established before the court below amounting to persistent cruelty. The dismissal of the first summons was tantamount to a finding that there was no cruelty justifying the wife in leaving. At the time of the second assault the wife by leaving had so far disclaimed her obligations as to disentitle her to relief under the statute: *Weatherley* v. *Weatherley*. (1) A sudden act of violence on a sudden quarrel does not constitute persistent cruelty: *Goodman* v. *Goodman*. (2)

*F. L. C. Hodson* for the respondent. The justices saw the parties and were right in their conclusion. The assault in October was committed under circumstances directly involving the obligations of the married state, whether there was at the moment a subsisting cohabitation or not. It revived the first assault.

THE PRESIDENT (LORD MERRIVALE). The case raises a question under the Summary Jurisdiction (Married Women) Act, 1895, as amended by the statute of 1925. The husband in the case, who is the appellant, had been found guilty upon the evidence, as the justices concluded, accepting the evidence, of two somewhat serious assaults upon his wife, one in June, and one in October, 1931. The justices had some knowledge of the relations of the parties, having already dismissed a summons of the wife alleging that the husband had deserted her when she ceased to live with him because of their unhappy relations, and also a summons for failure to maintain. But

(1) (1929) 46 Times L. R. 28. (2) (1931) 95 J. P. 95.

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upon this summons they found that the husband had been guilty of persistent cruelty, upon the facts of which there is proof in the evidence.

The case is remarkable in this way. The wife for a substantial period before the second of the assaults on which the charge was founded had ceased to live with the husband, and she was no longer living with him in their matrimonial home at the time when the assault occurred. They had been living together when the first assault occurred. Counsel for the appellant submitted that the second assault was not an act which arose in the course of the relationship of husband and wife, that the wife had ceased to carry out her duties as a wife, that she in substance was molesting her husband, and that it was in the course of molestation of him by her that under some provocation he was guilty of this latter assault. We have to look at the whole of the facts. It may well be that, if the husband and wife were living apart and as to some matter not concerned with the marital relationship there were acts of violence, it would have to be considered whether they were acts of violence within the statute, or whether they would support a charge of persistent cruelty within the statute ; because the statute does undoubtedly deal with, and is no doubt limited to, the relations of husband and wife. So, as I say, it is necessary to see what the facts really are.

The substance of the matter is this, that the husband, according to the evidence of the wife and two witnesses, was persisting in an improper relationship with a young woman whose acquaintance he had made, that the wife resented this relationship of her husband with another woman, that by reason of that resentment of hers the disagreement took place between them which resulted in his making the first assault upon her in the course of the summer of last year, and that, by reason of the persistence of the relationship and the wife's discovery that it was continuing in an aggravated form, the husband, being provoked by his wife's presence upon a scene when, as she says, he was behaving improperly, made a second assault upon her. The whole of the matters alleged against the husband centre upon his alleged improper

relationship with another woman, and it cannot be said, accepting the evidence as it is given and as the justices have found, that they are outside the ambit of the marital relationship. The wife was making her protest on the second occasion against that which was an infringement of the obligations of the husband, and was making a protest as a wife, and there is that connection between the first assault and the second assault. Whether the suddenness of the occurrences or the extent or effect of any alleged provocation reduces the gravity of the husband's conduct is a matter entirely for the justices. We have only to consider whether there was evidence before the Bench on which they could reasonably find that the husband in his capacity of husband in relation to the wife as his wife had been guilty of persistent cruelty. In my opinion there was such evidence, and I think, therefore, the appeal fails.

BATESON J. I agree.

*Appeal dismissed with costs.*

Solicitors for the appellant: *Josiah Smith, Manchester.*

Solicitors for the respondent: *Whitfield, Byrne & Dean, for S. Thompson, Altrincham.*

R. M. M.

1932
*May* 11.

## WATKINS *v.* REDDY.

*Probate—Practice—Trial of Probate Action at Assizes—Mode of Trial—Jury—Rules of Supreme Court, Order* XXXVI., *rr.* 1 *to* 6 *inclusive—Court of Probate Act,* 1857 (20 *&* 21 *Vict. c.* 77), *ss.* 35, 38—*Supreme Court of Judicature Act,* 1873 (36 *&* 37 *Vict. c.* 66), *ss.* 3, 23—*Supreme Court of Judicature Act,* 1875 (38 *&* 39 *Vict. c.* 77), *ss.* 18, 21—*Statute Law Revision Act,* 1892 (55 *&* 56 *Vict. c.* 19), *s.* 1—*Supreme Court of Judicature (Consolidation) Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 99, *sub-s.* 1 (*h*).

There is power in the Probate Division in remitting a case for trial at assizes to order that the trial shall be by a judge without a jury.

Motion to set aside an order made by a judge in Chambers varying an order of a registrar, which directed the trial of a Probate action by a special jury at assizes, and directing the trial to take place at assizes before a judge without a jury.

The plaintiff, George Thomas Watkins, brought an action to establish a will and codicil of William Henry Butler deceased. The defendant, Claude Butler Reddy, pleaded to the will and codicil propounded and to certain testamentary papers intermediate in date and set up a will earlier in date. Another defendant, Cordelia Butler, by a counterclaim supported the case of the plaintiff. The pleadings raised the issues of execution and want of knowledge and approval. On April 15, 1932, a registrar ordered the trial of the action at Bristol Assizes before a judge and special jury. On April 25, 1932, Bateson J. made an order on summons varying the order of the registrar in so far as it directed trial before a judge and special jury and ordered trial by a judge alone. On May 4, 1932, the defendant Reddy gave notice of application to restore the summons or to adjourn the same into Court or give the defendant leave to appeal from the order of April 25. On May 9, 1932, Bateson J. gave leave to the defendant to give notice of the present motion in Court for the argument of, and the re-hearing of, the question as to the mode of trial.

It was agreed by all parties that the re-hearing should take place as if the summons had been adjourned into Court for argument with a view to an appeal.

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*Clifford Mortimer* for the defendant. By the Court of Probate Act, 1857, s. 38, the Court had power to direct the trial of an issue at assizes, but only by a jury. In 1866, in the case of *Bushell* v. *Blenkhorn* (1), Sir J. P. Wilde expressly decided that he could only order trial, at assizes, with a jury. By the Supreme Court of Judicature Act, 1873, s. 3, the Court of Probate was consolidated with other Courts as the Supreme Court of Judicature, and by s. 23, where no special rule or order is made the jurisdiction is to be exercised as it might have been by the Court whose jurisdiction has been transferred, and by the Supreme Court of Judicature Act, 1875, ss. 18, 21, the rules and orders and procedure of the Court of Probate are preserved. The rule laid down by Sir J. P. Wilde in *Bushell* v. *Blenkhorn* (1) continued in operation after the Statute Law Revision Act, 1892, as, although that Act repealed the section of the Act of 1857, it specially saved practice and procedure under the repealed Acts: s. 1. But after the passing of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 99, sub-s. 1 (*h*), giving powers to make rules prescribing what trials shall be with or without a jury, the following direction was given in the Probate Registry on December 8, 1927: "Probate actions at assizes. Juries. In view of the repeal of section 38 of the Court of Probate Act, 1857, by the Statute Law Revision Act, 1892, the case of *Bushell* v. *Blenkhorn* (L. R. 1 P. & M. 89) need no longer be followed. An order may be made by a registrar for the hearing of a Probate action at assizes without a jury."

[BATESON J. The repealed section speaks of "issues." It does not purport to deal with the trial of the whole case.]

At all events, as the section of the Court of Probate Act is repealed, the matter is now governed by Rules of Supreme Court, Order XXXVI., rr. 2 to 6, which implement the Supreme Court of Judicature (Consolidation) Act, 1925. There is nothing in those Rules to show that they limit the discretion to order trial by a jury. Even if the discretion is so limited, r. 4 applies and preserves the right to a jury unless dispensed with by consent.

(1) (1866) L. R. 1 P. & M. 89.

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*F. L. C. Hodson* for the plaintiff. The case comes within the discretion to refuse a jury given by Order XXXVI., rr. 2, 4.

*H. B. Durley Grazebrook* for the defendant, C. R. Butler, supported the argument for the plaintiff.

BATESON J. In this case the question arises whether the order I made in Chambers for trial by a judge alone could be properly made having regard to the statutes and the Rules. Counsel's argument was that by the Act of 1857, ss. 35 and 38, power was given to the Court to direct an issue to be tried at assizes with a jury and no other power, and he cited the case of *Bushell* v. *Blenkhorn* (1), in which Sir James Wilde held that he had no power to make an order for trial by a judge at assizes without a jury ; and that is so under the sections that have been referred to, ss. 35 and 38. Those two sections remained in force until they were repealed by the Act of 1892. In the meantime the Judicature Act, 1873, was passed by which the Probate Court was handed over to and became part of the High Court of Justice, followed by the Judicature Act of 1875 which saved the rules and orders of the Probate Court. In 1892, however, ss. 35 and 38 of the Court of Probate Act, 1857, were repealed in terms by the Statute Law Revision Act of that year, but there was a proviso in s. 1 that the Act was not to affect any established jurisdiction derived by, in or from any enactment repealed. Counsel's argument was that that kept alive the limited jurisdiction of sending a case to assizes for trial by a jury only, and, therefore, that that was the only power that remained now. Fortunately for me, I have not got to decide that interesting point, because, although there may have been no jurisdiction before 1892, it is quite obvious that now by the Rules of the Supreme Court under Order XXXVI. there is jurisdiction either enlarged or substituted for the old jurisdiction. Therefore, one is thrown back to the Rules under Order XXXVI. in the Annual Practice. Now under Order XXXVI., r. 1, there is power for a judge to direct the mode of trial on the summons for directions. Under r. 2, unless r. 6 applies,

(1) L. R. 1 P. & M. 89.

there is to be no jury, though the judge has power to order one. Rule 6 says in effect that there is to be a jury except in cases where rr. 3, 4 and 5 apply. Rule 3 relates to Chancery cases, r. 5 relates to prolonged examination of documents and scientific investigation, and r. 4 relates to cases which before November, 1875, could without consent be tried without a jury, and without discussing r. 5, I am not sure that that rule does not really apply to this case, in which there is such a large number of wills to be considered, which is a very awkward thing for a jury to have to do. Then, is this a case which without consent could have been tried without a jury before November, 1875 ? The answer to that must be : " Yes, it could " ; unless you are to read into r. 4, " at assizes " or " provided the case is to be tried in London," or words to that effect, neither of which appear in the rule. I think that the rule means that if you find it is a case which could have been tried without a jury before November, 1875, the Court can now say it may be tried by a judge alone. Counsel admits that the words of the rule are in themselves against him, but still he says that his contention is right, because before 1875 this case, being an assize case, could not have been tried without a jury, having regard to the Act of 1857. I do not think that that contention is right. If I had thought that that was right I should again have had to consider what effect s. 1 of the Act of 1892 (the proviso I have already referred to) has upon these cases. My own inclination would be to say the repeal is a repeal of the original section and takes away that confining of the right to try at assizes to jury cases only. But, as I say, I have not got to decide it and I do not propose to do so.

There is only one other thing to refer to, and that is that in December, 1927, the President gave a direction in the terms referred to in argument, in effect saying what I have said in my judgment. It is quite possible to send a case to the assizes for trial by a judge alone. That is the effect of it. That has been acted upon since 1927, and, I think, rightly acted upon.

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I want to add this, that if nowadays a Probate case could not be sent to assizes to be tried in what is the best way for trying the case whether by jury or judge alone, it would be a very great pity, and I am very glad that I have been able to come to the conclusion that I have. It is certainly a better way for ensuring justice than the restricted rule which counsel argued for.

For these reasons this application must be dismissed. Costs in the cause.

Solicitors for the plaintiff: *Hancock & Willis, for Barry & Harris, Bristol.*

Solicitors for the defendant Reddy: *Arthur Taylor & Co., for Titley, Long & Vale, Bath.*

Solicitors for the defendant C. R. Butler: *Calder Woods & Sandiford, for Wansbroughs, Robinson, Tayler & Taylor, Bristol.*

R. M. M.

## MATTHEWS *v.* MATTHEWS.

1932
*May* 24.

*Husband and Wife—Appeal from Magistrate—Parties living apart under Deed of Separation—Covenant by Wife not to claim Maintenance or institute Proceedings against Husband in respect of Maintenance—Effect of Deed—"Wilful neglect to provide reasonable maintenance"—Summary Jurisdiction (Married Women) Act*, 1895 (58 & 59 *Vict. c.* 39), *s.* 4—*Summary Jurisdiction (Separation and Maintenance) Act*, 1925 (15 & 16 *Geo.* 5, *c.* 51), *s.* 1, *sub-s.* 1.

An agreement for separation between husband and wife providing payments by the husband for the benefit of the wife, coupled with an agreement by her not to make any claim for maintenance or to institute proceedings for that purpose, does not oust the jurisdiction of the Court under the Summary Jurisdiction (Married Women) Act, 1895, and the Summary Jurisdiction (Separation and Maintenance) Act, 1925, to inquire whether the husband has been guilty within the meaning of the Acts of "wilful neglect to provide reasonable maintenance." The deed is of merely evidential value in proceedings for maintenance under the Acts and does not act as an estoppel, although it might have had that effect in proceedings at common law.

APPEAL of the husband from the order of a magistrate ordering him to pay to the wife a weekly sum of five shillings upon the finding of the Court that he had wilfully neglected to provide reasonable maintenance for her.

The parties were married in 1922. They separated in 1931. By an agreement for separation dated July 15, 1931, the husband agreed to pay his wife certain lump sums and to execute certain works on property occupied by her where she carried on a business, and in consideration thereof the wife agreed that she "would not at any time thereafter make any claim or demand upon the husband for maintenance or institute any legal proceedings against him in respect thereof and would at all future times wholly support and maintain herself." The husband had discharged his liability under the agreement, but the business of the wife had failed. The husband, having also got into difficulties, made no further payment to the wife, who took proceedings against him under the Summary Jurisdiction Acts for wilful neglect to maintain her.

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The magistrate found that the wife was in very poor circumstances, that the husband was able to make a contribution to her maintenance, and that the wife signed the agreement for separation to get money to pay rent, rates and taxes in her business. The magistrate also found that the covenant of the wife was not a bar to her obtaining an order for maintenance under the Summary Jurisdiction and Maintenance Acts, 1895 and 1925, if she showed that she was unable to maintain herself and that the husband being in a position to contribute to her maintenance had wilfully neglected to do so.

The husband appealed on the grounds that the Court below was wrong in law in holding that the agreement for separation by which the wife agreed not to make any claim or demand for maintenance was void, and that there was no evidence of the husband's means.

*Hon. Victor Russell* for the appellant. The husband has discharged his liability under the deed and consequently there is no wilful neglect to provide reasonable maintenance within the meaning of the statutes. *Diggins* v. *Diggins* (1) is not inconsistent with this view. In that case the husband had not made the payments stipulated for by the deed.

[THE PRESIDENT (LORD MERRIVALE). The question is what is "reasonable maintenance."]

*J. C. Moore* for the respondent. The wife was not a free agent in the matter of the deed. She was practically compelled to sign it to obtain money to carry on the business which was her sole means of support. She was under duress. The Court will not hold her bound by the deed under the circumstances.

[He referred to *Adamson* v. *Adamson* (2) and *Holroyd* v. *Holroyd*. (3)]

THE PRESIDENT (LORD MERRIVALE). Like many cases under the section in question—namely, s. 4 of the Act of

(1) [1927] P. 88. (2) (1907) 23 Times L. R. 434.
(3) (1920) 36 Times L. R. 479.

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1895, as amended in 1925—the facts raise an interesting question of law, but when the law is examined it is found that the governing consideration here is that which it has been found to be in a variety of cases where the operation of the statute has had to be considered. Some of them have been cited. New cases come up, because cases almost invariably differ in their details, and neither of the cases which have been referred to is decisive of this case. No doubt the case nearest to it is *Diggins* v. *Diggins*. (1) The cases of *Adamson* v. *Adamson* (2) and *Holroyd* v. *Holroyd* (3), cases of coercion, were cases in which agreements were avoided, because they had no operative effect against the party who was proceeding, notwithstanding the signing of the agreement. This is not a case of that sort. The facts here are that the husband and wife were not getting on well together and they came to the conclusion that they would not live together, or, at any rate, that the wife should have a separate business and that the husband should make some contribution toward the business. Upon that footing he and she entered into the agreement on which he now founds his main ground of defence—the agreement of July 15, 1931—whereby provision was made for the better establishment of the business which the wife intended to carry on, or contemplated carrying on. One of the principal means agreed upon was a series of payments amounting to 100*l.*—50*l.* down and the remaining 50*l.* by monthly instalments of 10*l.* each. What the parties supposed was that with good fortune the wife would be able to maintain herself by that business, as she was willing to do, and she agreed in the terms of the agreement that she would carry on that business, and that in consideration of the husband's provision under the agreement she would not, at any time, thereafter make any claim or demand upon him for maintenance, or institute any legal proceedings against him in respect thereof, and would at all future times wholly support and maintain herself. As between two people who were not limited in their common law rights by Act of

(1) [1927] P. 88. (2) 23 Times L. R. 434.
(3) 36 Times L. R. 479.

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Parliament, or were not provided with privileges by Act of Parliament, no doubt it would have been a good agreement to exclude a subsequent claim, but the matter is between husband and wife. What happened was that the business failed and the husband, who was in business as a builder and able at that time to put down 50*l.* of ready money and to arrange for monthly payments of 10*l.* a month, entered shortly afterwards into a composition with his creditors, and he thereupon said to the wife, she having failed in her business: "You can go and live with a relative; she is ready to receive you and I shall not be able to make any payment to you." Perhaps he put it in a somewhat stronger way than that. In that state of the case the wife, being under the necessity of obtaining maintenance, resorted to the police court under the Summary Jurisdiction (Married Women) Act, and the magistrate after a patient hearing of the case ordered the husband to pay 5*s.* a week.

It is said that there is no jurisdiction, that the agreement between the parties bound the learned magistrate and binds this Court, and that the wife has excluded herself from any possible benefit under the Summary Jurisdiction Acts, and it is said also that there was no evidence before the learned magistrate on which he could find that the husband could provide anything for the wife. As to the first point, the language of the Act of Parliament supplies the test. The question before the magistrate was not whether this was an agreement which would be good at common law between independent parties and would exclude subsequent proceedings. What he had to determine was whether the husband had been guilty of wilful neglect to provide reasonable maintenance for his wife, and in order to determine that he had, of course, to look at what had taken place between the parties, and to look at the agreement and to see what the husband had done and was doing, but he still had to determine judicially whether the husband had been guilty of wilful neglect to provide reasonable maintenance for his wife. That depended on two things: First, whether he had failed to maintain her; secondly, whether he had done it wilfully. The magistrate took the

view that, although the husband had made a composition with his creditors and was living under the shelter of his father's protection, he was wilfully neglecting to provide some maintenance for his wife, and the magistrate found what sum he could certainly provide. I will come to that again in a moment. The learned magistrate in my judgment applied his mind to the right question and gave to the agreement between the parties its proper value, which was evidential value and not value by way of estoppel, and giving the proper effect to the agreement, that is, coming to the conclusion that it left it open to him to determine the question in the case and did not exclude the jurisdiction of the Court, he considered the husband's position. When you see what the husband's position is, what he was doing, and what his protestations were and what happened, it is not unnatural that the learned magistrate, being a man of experience as well as a man of law, came to the conclusion that his defence of having no capacity to pay anything was unfounded. He said, "At any rate, he can pay 5*s*. a week; I am clear as to that upon the facts before me." I think the magistrate took a moderate view as well as a just view of the case, and that his judgment is correct on both the points in respect of which it has been assailed.

LANGTON J. I agree. I think this is not altogether an easy case. As my Lord has said, the magistrate has addressed his mind to what is the real and correct point here. The point is whether this man, the appellant to-day, has been guilty of wilful neglect to provide reasonable maintenance. He sets up a deed of separation between himself and his wife as a bar to the jurisdiction of the Court. In my judgment in that he is wrong. I do not think it is any such bar. As my Lord has said, it is a matter of evidence whether such a deed does, in fact, provide reasonable maintenance. I do not say that in this particular case when the parties entered into that agreement they had not a perfectly bona fide belief that it would produce reasonable maintenance and that they did not mean it so to do, but matters turned out quite

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differently to anything they had expected. Therefore, what the learned magistrate had to do was not merely to look at this deed, but to look at the Act of Parliament to which his mind was addressed, and I think that when one looks at his judgment in the matter, and his reasons which are admitted to have the status of a judgment, it is quite clear that he addressed his mind to the correct point and arrived at the correct conclusion. The evidence in the case has not, I think, gone quite so far as counsel for the respondent claimed in saying that the lady was constrained by duress to enter into this agreement. The magistrate examined the agreement exactly as it stands, and he examined all the circumstances—I think that is the right way to look at this agreement—and he has given it the proper evidential value. He said, "It is an agreement which they entered into with their eyes open. I see what they have done and I quite understand why they did it. I am not saying they did anything wrong, but I have still got to go further than that, and I have got to see whether to-day this man is right or wrong under the statute. I have come to the conclusion that in his circumstances to-day, which again I agree are very poor circumstances, he is guilty of wilful neglect to provide reasonable maintenance." Having arrived at that conclusion, he has said that the man should in those circumstances contribute a small sum—and he has made it properly small—to the maintenance of his wife. I cannot help feeling that having done so he has given the best possible consideration to this case, and has arrived at a very just result. I think, therefore, with my Lord that this appeal should certainly be dismissed.

*Appeal dismissed with costs.*

Solicitors for the appellant: *H. I. Sydney & Co.*

Solicitors for the respondent: *Parfitt, Cresswell & Williams.*

R. M. M.

## THE MONS.

1932
*May* 2, 11.

*Shipping — Liens — Priorities — Masters' Disbursements — Necessaries Men —Master's Wages—Crew's Wages.*

In June, 1931, the steamship *Mons* was supplied by a firm of necessaries men with bunker coal, for which the then master bound himself and the ship, and in January, 1932, another firm supplied the ship with coal, for which the succeeding master bound himself and the ship. In actions in rem in the names of the respective masters for disbursements :—

*Held*, that the claims ranked pari passu and not in the inverse order of their attachment.

The lien of the master for disbursements is the same as his lien for wages, and accordingly ranks on the same footing.

The master's lien for wages is postponed to that of the crew.

*The Salacia* (1862) Lush. 545 followed.

Motion to determine priorities.

On January 17, 1932, the *Mons*, a Norwegian steamship of 791 tons gross, while in the course of a voyage from Norway to this country with a cargo of pitprops, encountered bad weather, and, having burnt all her bunker coals, had to take the salvage assistance of the trawler *Heugh* to tow her to Aberdeen.

A salvage action (fo. 24) was instituted against the vessel, her cargo and freight; no appearance was entered by the shipowners, and the *Mons* was sold under order of the Court and realized 1464*l.* 14*s.* 5*d.* [An appearance was entered in respect of the cargo, which was valued at 1201*l.* 13*s.* 10*d.*, but the cargo owners were not concerned in the present motion.] On April 11, Langton J. made a salvage award of 650*l.* rateably against the ship and cargo.

Judgments in rem against the *Mons* were also obtained in the following actions :—

Fo. 66. An action by Martin Clausen, a former master of the *Mons*, who had bound himself and his vessel under the terms of a written order upon which bunker coals to the amount of 212*l.* 12*s.* 3*d.* had been supplied to the ship in June, 1931, at Kopervik, Norway, by a firm of necessaries men.

Fo. 31. An action by Sigmund Thorbjornsen, the master of the *Mons*, who had pledged the vessel and freight under a promissory note for 83*l.* 9*s.* 5*d.* given to an Esbjerg firm of

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necessaries men, who had supplied bunker coal to the vessel in January, 1932, before she started on her voyage to England.

Fo. 43. An action by Thorbjornsen and the crew of the *Mons* in respect of (*a*) disbursements by the master for provisions and travelling expenses amounting to 28*l.* 10*s.*, and (*b*) wages of the master and crew for varying periods between September, 1931, and February, 1932, amounting to 589*l.* 4*s.* 5*d.*, i.e., both prior to and after the salvage services.

The proceeds of the ship and freight being insufficient to satisfy all the judgments, the present motion was set down to determine the priorities.

*R. F. Hayward* for the salvors (fo. 24).

*K. S. Carpmael* for the claimants in fos. 66 and 31.

*J. V. Naisby* for the claimants in fo. 43.

[It was admitted in the course of the arguments (in which no cases were cited) that the wages of the master and crew earned subsequent to the salvage services should take priority over the salvage claim.]

*Cur. adv. vult.*

1932. May 11. LANGTON J. One or two minor problems were raised by this motion, and, as they were matters which I do not think have been dealt with before, I reserved my judgment to consider them.

I will dispose first of a point which was not really in dispute—namely, the question of the value of the master's lien for wages as compared with that of the crew. There is good reason, and, although an old case, good authority (*The Salacia* (1)), why the crew's claim for wages should have priority to the claim of the master, and Mr. Carpmael did not contend to the contrary. The master's lien, therefore, must be postponed to that of the crew.

The next matter was a curious point as to whether the master's lien for disbursements was on the same footing as his lien for wages. In my view there is no substance in this point. When one is considering the ranking of liens regard is had to the position of A.'s lien as against B.'s, but the relative positions of A.'s liens are not matter for consideration at all.

(1) Lush. 545.

A master either has a valid claim in respect of wages and/or disbursements or he has not. If he has a genuine claim for disbursements it will rank on precisely the same footing as his claim for wages.

The third point is more important. It is whether the claims of the respective masters for disbursements should rank pari passu or in the inverse order of their attachment; and, as Mr. Carpmael said, the authority on the point is of a somewhat illusory character. In Roscoe's Admiralty Practice, 5th ed., p. 227, it is stated that it may be regarded as settled that "liens ex contractu or quasi ex contractu rank against the res in the inverse order of their attachment, on the ground that the last act in respect of which the latest claim arises being a service to those who have anterior claims is entitled to rank before such claims. As regards wages earned before a salvage service, this is clearly just, because the salvors have preserved the res in which the sailor has a lien." The authorities do not support quite so wide a statement as the one I have just quoted. They really only show that in certain instances liens of a contractual character have been held to rank in the inverse order of attachment, and I have considered them carefully to ascertain whether I can find any reason in law or in natural justice why these particular liens should be held to rank in any other order than the natural one of pari passu.

The origin or idea of liens ranking in the inverse order of attachment is not far to seek. Where a ship has been salved, as this one was, it accords with one's natural view of justice that the salvor who has preserved the whole of the res should have his claim considered in priority to the various creditors of the ship who would have nothing upon which to claim if the exertions of the salvor had not been made. But when one is considering claims, as between two creditors who have supplied necessaries to the ship or claims made in the name of the master for necessaries, it is difficult to see how the same principle could be applied, or indeed why it should be applied at all. A. supplies necessaries in January, and B. supplies them in February. The master pledges his credit for both,

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and both claims come against the proceeds of the sale of the ship. Why should B.'s claim be preferred to A.'s? Of course, if A. has been guilty of some form of laches or negligence in putting forward his claim one could see some ground for preferring B.'s claim to A.'s. No suggestion of that sort is made here, and I can see no ground of authority and no ground of equity or justice upon which one should be preferred to the other. The claims of the necessaries men (suing in the names of the masters) acquired the priorities of those masters, and the two masters' claims, including those of the necessaries men, will rank pari passu. Any other claims for disbursements will also rank pari passu and not in the inverse order of attachment.

It is to be noted that it was admitted on behalf of the salvors that wages earned subsequent to the salvage service took priority of the salvage claim. Accordingly, in this particular case, there will be certain wages and disbursements of a later date which will take priority of wages and disbursements of an earlier date. This priority is solely due to the intervention of the salvage services and the admission by the salvors in this case of a priority in respect of wages (and disbursements, I hold, are on the same footing) incurred subsequent to their own services, and does not rest on any principle of inverse order of attachment.

The order of priority will therefore be as follows: (i.) the costs of the arrest up to the date of the order for sale; (ii.) the crew's wages subsequent to salvage; (iii.) the master's wages and disbursements subsequent to salvage; (iv.) the salvage award and costs; (v.) the crew's wages before salvage; (vi.) the wages and disbursements of the two masters before salvage.

Solicitors for the salvors (fo. 24): *Botterell & Roche, for Botterell & Roche, Sunderland.*

Solicitors for the claimants in fos. 31 and 66: *Stokes & Stokes, for Bramwell, Clayton & Clayton, Newcastle-upon-Tyne.*

Solicitors for the claimants in fo. 43: *Charles Lightbound, Jones & Lightbound, for Ingledew & Co., Newcastle-upon-Tyne.*

E. C. M. T.

## THE ZIGURDS.

1931
*Oct.* 20, 21, 22, 23, 28, 29.
1932
*May* 13, 26, 27;
*June* 7.

*Shipping—Proceeds of Ship and Freight—Mortgagee—Necessaries Men—Equitable Assignments of Freight—Priorities—Right of equitable Assignee to Sue in rem.*

*German Necessaries Men—Nature of Claim under German Code—Rights analogous to Maritime Lien—Priorities as against Mortgage and English Necessaries Men.*

*Ship Repairers—Value of Ship enhanced by Repairs—Priorities as against Mortgagee.*

*Stevedores—Priorities as against equitable Assignee of Freight.*

Various claimants against the Latvian steamship *Z.* had obtained judgments in rem in default of appearance, the ship had been sold, and the proceeds, together with the freight, had been paid into Court. The fund was insufficient to satisfy all the claims. Among the claimants were a mortgagee of the ship and a firm of necessaries men who were also the ship's agents. From the owner and master respectively these claimants had obtained documents which each alleged constituted a legal assignment of the freight of the *Z.* to them. The Court found that in neither case had the statutory requirements for a legal assignment been satisfied, but that both claimants had good equitable assignments, and that, as a letter to the consignees of the cargo, relied on by the necessaries men as notice of the assignment, was not sufficiently clear and conclusive, the mortgagee had the priority. The action by the necessaries men was in rem against the ship and freight, and against the cargo and freight as assignees of the freight:—

*Held*, that the action against the freight was maintainable in rem under the equitable assignment.

German necessaries men had supplied bunker coals to the *Z.* in a German port, and according to the German Code, as "ship's creditors," if the ship were under arrest in Germany, had rights analogous to those given by a maritime lien. They claimed, therefore, that they were creditors of a higher order than either English necessaries men or mortgagees, who had no such rights:—

*Held*, that necessaries claimants were a class of creditors well known to English law, that any special rights which these particular claimants had were rights peculiar to German law, and that foreign law could not be adduced to alter the English rule of ranking, under which the claims of necessaries men ranked pari passu and after those of a mortgagee.

*The Colorado* [1923] P. 102 considered and distinguished.

A firm of boiler makers and ship repairers had done repairs to the boilers of the *Z.*, which enhanced her value, and they claimed that in equity they should have priority over the mortgagee who obtained the benefit of them:—

*Held*, that as the repairs had been ordered by the owner and the claimants had looked to him for payment, there was no equitable doctrine under which their claim should be preferred to that of the mortgagee.

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Stevedores who had discharged the cargo of the *Z.* claimed that, as the mortgagee was invoking the equitable jurisdiction of the Court, he must also do equity, and that, as by receiving the gross freight instead of the net he would be getting more than the shipowner (who would have had to pay the stevedoring charges) would have received, their claim should have priority:—

*Held*, that the general rule as to ranking must be followed under which the mortgagee had the priority.

IN these proceedings a number of claimants obtained judgments in rem in default of appearance against the Latvian steamship *Zigurds* and her freight.

The ship had been sold, and the proceeds, 1421*l.* 3*s.* 6*d.* had been paid into Court together with the freight, 1837*l.* 14*s.* 10*d.*, and a sum of 60*l.* by way of demurrage. The fund being insufficient to satisfy all the claims the various plaintiffs obtained leave to intervene in the several actions and dispute the validity and priority of each other's claims. The claimants and interveners material to this report were the following:—

(A) E. A. Casper Edgar & Co. .. .. 1931, Fo. 124
(B) Alfred Harris Smith (hereinafter called "the mortgagee") .. .. .. ,, ,, 107
(C) Kohlen Gross Handel G.m.b.H. und Kieler Kohlen-Kontor G.m.b.H. (hereinafter called "the Kohlen Company") .. .. .. .. ,, ,, 128
(D) Metcalfe, Lamb & Co. .. .. ,, ,, 199
(E) Evans, Reid, Teasdale & Lidstrom (hereinafter called "the stevedores") 1932, ,, 62

The proceedings reported are those in Fo. 124, which was in form a motion to set aside part of a judgment and a motion and cross-motion in objection to the Registrar's report, and those in Fo. 107, which was a motion to determine priorities and for payment out.

*J. V. Naisby* for Casper Edgar & Co.
*H. Atkins* for the mortgagee.
*K. S. Carpmael* and *H. G. Willmer* for the Kohlen Company.
*G. H. Main Thompson* for Metcalfe, Lamb & Co.
*Geoffrey Hutchinson* for the stevedores.

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(A) CASPER EDGAR AND COMPANY'S CLAIM.

This was a claim for 1500*l.* against the ship and freight for necessaries supplied and against the cargo as assignees of the freight. The cargo in fact was not proceeded against, as the consignees paid the freight into Court. The plaintiffs obtained judgment ex parte, subject to a reference, but on the reference the Registrar reported that they had failed to establish any assignment to them of the freight, and accordingly disallowed various items of their claim. The facts were as follows: The plaintiffs were acting as ship's agents for the *Zigurds* at West Hartlepool, and were asked to make disbursements and incur expenses on behalf of the vessel. Before doing so, on March 2, 1931, they obtained the following document addressed to the cargo owners, which was signed by the master of the *Zigurds* with the approval and consent of her managing owner: "Please pay the freight for my vessel, the *Zigurds*, and all demurrage which may be payable under the charter to my agents, E. A. Casper Edgar & Co., Ld., and oblige." The plaintiffs alleged that this letter constituted a legal, or, in the alternative, an equitable assignment of the freight.

*Carpmael* and *Willmer* intervening for the Kohlen Company. The Registrar was right, for the document relied on does not constitute a legal nor even an equitable assignment.

[This branch of the case is not material to this report and the arguments therefore are omitted, but it is thought that the following list of the cases cited may be useful: *Harding* v. *Harding* (1); *Harper & Co.* v. *Bland & Co.* (2); *In re Williams* (3); *Tolhurst* v. *Associated Portland Cement Manufacturers* (4); *Durham Brothers* v. *Robertson* (5); *Comfort* v. *Betts* (6); *Beynon* v. *Godden* (7); *In re Westerton* (8) and *Wm. Brandt's Sons & Co.* v. *Dunlop Rubber Co.* (9)]

Even if the document be held to amount to an assignment the action is wrongly constituted, for there is no right to

(1) (1886) 17 Q. B. D. 442.
(2) (1914) 20 Com. Cas. 143.
(3) [1917] 1 Ch. 1.
(4) [1903] A. C. 414.
(5) [1898] 1 Q. B. 765.
(6) [1891] 1 Q. B. 737.
(7) (1878) 3 Ex. D. 263.
(8) [1919] 2 Ch. 104.
(9) [1905] A. C. 454.

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proceed in rem against the freight. The shipowner, it is submitted, could not proceed in rem against the freight nor against the cargo for freight. He has a common law possessory lien on the cargo and can land the cargo under s. 494 of the Merchant Shipping Act, 1894. His assignees, the ship's agents, can have no better rights. This is an action in fact against the receivers in respect of freight and does not lie in rem.

*Naisby* for Casper Edgar & Co. If the plaintiffs have a good assignment, legal or equitable, they have a right in rem against the freight. If a legal assignment, s. 136 of the Law of Property Act, 1925, gives to the assignee all the rights which his assignor would have, and even if merely an equitable assignment the rights are nevertheless transferred. In either case the assignor, the shipowner, can proceed in rem against the freight, for the res, the cargo, could have been arrested for the freight and "the owners of the cargo lately laden on board" are included as defendants in the writ. The plaintiffs can unquestionably sue in rem under s. 22 of the Judicature (Consolidation) Act, 1925, in respect of necessaries supplied to a foreign ship and can add a claim in rem against the cargo for the freight, for any action brought in the Admiralty jurisdiction can, under s. 33, be brought in rem or in personam.

1931. Oct. 22. LANGTON J. said that the document relied on was a mere authority to pay, and fell far short of the requirements of s. 136 of the Law of Property Act, 1925, for a legal assignment. He had, however, come to the conclusion on the evidence that there was an intention to assign and an equitable assignment of the freight and demurrage, and further that the action was not badly constituted merely because the assignor was not joined as a plaintiff. [His Lordship continued as follows:] I have considered the point whether the action is maintainable in rem under the assignment, and am of opinion that it is so maintainable and, as I have held that there is a good equitable assignment, I think it follows that these items in dispute which the Registrar has

disallowed should all be included in the claim put forward on the basis of the assignment.

(B) THE MORTGAGEE'S CLAIM.

In this action the plaintiff, who was the mortgagee of the ship, claimed that under a supplementary agreement of April 30, 1929, he had a legal assignment of the freight of the *Zigurds*. His total claim, which had been assessed by the Registrar, amounted to 4536*l*. 4*s*. 11*d*. It was resisted by, among others, Casper Edgar & Co. and Metcalfe, Lamb & Co., who objected to the Registrar's report being confirmed on the ground that the agreement relied on did not amount either to a legal or an equitable assignment. [The only materiality of this claim, on which judgment was reserved, is on the subsequent question of priorities, and the arguments on the nature and validity of the assignment are omitted.]

(C) THE KOHLEN COMPANY'S CLAIM.

These plaintiffs were a German company who had obtained judgment and had their claim assessed at 402*l*. 14*s*. 5*d*. in respect of necessaries (bunker coals) supplied to the *Zigurds* at a German port in September, 1930. They alleged that having regard to the provisions of the German Commercial Code they had priority, qua the proceeds of the ship, over all the English necessaries claimants and over the mortgagee.

*Carpmael* for the plaintiffs. Under the German Commercial Code these necessaries men are "ship's creditors," and as such have rights analogous to those given by a maritime lien. They have similar rights to those which in *The Colorado* (1) it was held were given by a French hypothèque, and that case is indistinguishable in principle. The plaintiffs have more than a mere right to sue in rem, they have a right under German law to follow the res into whosoever hands it may come; and the German law applies except as regards priorities, when, the nature of the claim having been ascertained, the lex fori applies. Accordingly, the nature of

(1) [1923] P. 102.

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the claim being higher than that of the mortgagee or the English necessaries men, the lex fori will give priority to the German " ship's creditors."

[Reference was also made to *The Stream Fisher* (1) and *Jacobs* v. *Crédit Lyonnais.* (2)]

*H. Atkins* for the mortgagee and *Naisby* for Casper Edgar & Co. *The Colorado* (3) was merely a case in which the Court did not know precisely what was the nature of a hypothèque, and therefore looked at the French law to ascertain the character of the charge. But these claimants are ordinary necessaries men, a very well ascertained class of creditors, and strictly, although no objection has been taken, the affidavit evidence as to the German law is inadmissible. But, put at the highest, that evidence merely goes to show that if the ship was arrested in Germany, " ship's creditors " could under certain circumstances follow the res.

[LANGTON J. referred to *The Tervaete.* (4)]

The rights described do not amount to a maritime lien, and *The Colorado* (3) itself is authority for the well established proposition that the rights and remedies of English law apply once the claim has been put in an ascertained class : see also *The Tagus.* (5)

(D) and (E). The claims to priority of Metcalfe, Lamb & Co., who had obtained judgment in respect of repairs to the boilers of the *Zigurds* executed in March, 1931, and of the stevedores, who had obtained judgment in respect of the cost of discharging the *Zigurds'* cargo of pit props at West Hartlepool in the same month, were not argued until after judgment had been given in the two preceeding claims (B) and (C).

*Cur. adv. vult.*

1932. May 13. LANGTON J. read the following judgment: I am sorry to have to admit that the ill-fortune which has attended this unfortunate vessel has not diminished since its

(1) [1927] P. 73.
(2) (1884) 12 Q. B. D. 589.
(3) [1923] P. 102.
(4) [1922] P. 259.
(5) [1903] P. 44.

affairs have come into the sphere of the Law Courts. Owing to circumstances not wholly under my own control, judgment in several matters has remained outstanding for several months, and I cannot even claim that the solution of the difficult matters submitted to me has become much clearer as these months progressed.

The first of these outstanding questions is an important point raised by the mortgagee as to whether he has either a legal or an equitable assignment of the freight here in suit. The claim is raised by the mortgagee in his action, Fo. 107, and is opposed by Mr. Naisby on behalf of Messrs. Casper Edgar & Co., who are both ship's agents and necessaries men, and by Mr. Main Thompson for Messrs. Metcalfe, Lamb & Co., who are also necessaries men.

At a previous hearing I have already decided that Casper Edgar & Co. have an equitable assignment but no legal assignment of the freight.

The claim is based upon a supplementary agreement dated April 30, 1929, between Edouard Jaunzems & Co., of Riga, Latvia, the owners of the *Zigurds*, and Alfred Harris Smith, the mortgagee. The main argument was directed to para. 29 where the following wording occurs: " 29. In relation to the matters dealt with herein where they apply the shipowners hereby appoint the mortgagee their attorney for them and in their name at any time during the currency of this security to collect sue for receive and give effective receipts for all freights hire salvage and/or insurance moneys whether return of premium claims or otherwise which may be or become due and owing to the shipowners, and to compromise and settle all claims and disputes in connection therewith."

[His Lordship said that it was claimed that this paragraph, when added to other paragraphs of the agreement, constituted an equitable assignment, and that the mortgagee had given notice sufficient to give him the position of a legal assignee. But the broad answer to all his contentions as regards a legal assignment of this freight seemed to be apparent when it was remembered what were the three principal pre-requisites of a legal assignment: i.e., it must be in writing, it must be absolute,

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and there must be express notice in writing to the debtor. All the claims as to notice were at the best of a constructive character, and fell far short of anything approaching express notice in writing to the debtor, and upon the broad ground that the requirements of the Law of Property Act, 1925, s. 136, were not complied with, the claim to a legal assignment of the freight failed.]

His Lordship continued as follows : As to the second point, whether this supplementary document contains an equitable assignment of the freight, I have not entertained very much doubt. The whole tenor of the agreement is in favour of placing the mortgagee in the most favourable position possible in the event of the default of the mortgagor, and affords clear evidence of the intention to assign. Moreover, in the circumstances, I do not think that the point that the mortgagor is not joined in the action, a point familiar to Courts of equity, could possibly be taken in a case where the mortgagor is a shipowner through whose default in business the whole trouble has been occasioned, and against whom judgment has been recovered by the several claimants in default of appearance.

There remains to be considered a question raised by Mr. Carpmael on behalf of the Kohlen Company, the plaintiffs in Fo. 128.

These plaintiffs are necessaries men who have obtained judgment against the ship and freight and have been awarded after reference to the Registrar the sum of 402*l.* 14*s.* 5*d.*

Their claim is in respect of certain bunker coals supplied to the *Zigurds* in Germany on September 5 and 22, 1930, under an agreement dated June 8, 1929.

The question now raised in reference to this claim is a contention that by reason of the terms upon which these bunker coals were supplied, the plaintiffs are entitled to rank as a matter of priority ahead not only of other necessaries men but also ahead of the mortgagee.

It is not surprising that a contention at once so novel and so bold was most stubbornly contested both by Mr. Atkins on behalf of the mortgagee and by Mr. Naisby on behalf of

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Casper Edgar & Co. and other necessaries claimants. I do not remember that any other voices were lifted in protest, but it would not have surprised me if all the various claimants to the meagre proceeds of the sale of this unhappy vessel had arisen in chorus to attempt the defeat of this unexpected claim.

The point, as argued by Mr. Carpmael, was both subtle and ingenious, and not altogether lacking in apparent support from unexceptionable authority. Having first produced evidence to show that the bunkers in question were bought and sold under a contract which conferred upon the sellers a status known to German law as that of "ship's creditors," he then invoked the German Commercial Code to show: first, that "ship's creditors" have by German law a priority over mortgagees in cases of conflicting claims, and, secondly, that they possess a right to follow their claim against owners subsequent to those who were in possession when the debt was incurred. In support of his claim he adduced in evidence, without objection, the contract upon which it was founded, and the opinion of a practising advocate in Germany named Werner. Against the claim there was an opinion in letter form from a well known German advocate, Dr. Sieveking. All this evidence was admitted before me without objection either as to form or relevance, and although upon reflection I have some doubts as to its admissibility upon the score of relevance, I do not think it would be fair to decide this point now upon the ground of inadmissibility of evidence, when the parties have proceeded so far without objection from one another or from the Court, and without an opportunity being afforded of arguing the matter further. Upon a close consideration of the German Code Mr. Carpmael conceded that he had no claim to priority as against the freights at present in suit, since s. 756 of the Code limits the lien conferred on ship's creditors to the freight of the particular voyage upon which their claim arises. As regards the proceeds of the ship, however, there is no such limitation, and it was against these proceeds that he pressed his claim.

The first answer to his contention was of course that German law has nothing to do with questions of priority in this country,

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which are determined according to the lex fori only, and although he covered much ground in his efforts to distinguish the present case from the general rule, over some of which I propose to follow his argument, I am of opinion that this is the last answer, as it is the first, to the proposition for which he contended. By way of distinction to the general rule he invited a close consideration of the several judgments of Hill J. and the members of the Court of Appeal in *The Colorado.* (1) In that case the Court of Appeal agreed to look to French law in order to discover the nature for purposes of priority of a certain form of French pledge called a "hypothèque," and having discovered that it possessed many of the attributes of an English mortgage, ignored the French law, which, notwithstanding those attributes, gave priority to a necessaries man over the holder of the "hypothèque," and applied the English law or lex fori to the ranking of claimants here, thus preferring the holder of the "hypothèque" to the supplier of necessaries. The suggested application of the procedure there followed to the present case was that, having first ascertained by a consideration of German law that the Kohlen Company were "ship's creditors," and as such held a priority to mortgagees in Germany, I must give them that priority even when applying the lex fori in England. Similarly, and perhaps a fortiori, I ought, it was said, to prefer them to ordinary necessaries men whose contracts of sale did not put them in any such favoured position.

I am of opinion that this argument positively bristles with fallacies. In the first place, I do not at all agree with the basic position which the plaintiffs claim for themselves as established by the evidence. I think that the true view of their position is that which is set forth by Dr. Sieveking in his opinion. Any rights which they have according to the contract and Code are rights peculiar to German law, and are of no value and of no avail to the plaintiffs unless and until they are enforced by arrest of the vessel and freight in the German Courts. I have known Dr. Sieveking personally for many years, and my respect for his integrity and learning deepens

(1) [1923] P. 102.

with the increasing length of the acquaintance. I am satisfied that he has stated this matter in its true colours. The German Code only purports to provide rights inter se of creditors in Germany. To facilitate the process in the German Courts it creates a special class called " ship's creditors." If and when the ship and freight are arrested by the German Courts certain results follow, but until there is such arrest in Germany no one is intended to be in any different position than they would occupy without these special provisions of the Code. No one, I think, would be more surprised than the persons who framed this German Code—of whom Dr. Sieveking was quite possibly one—than to hear that it was being invoked in England to settle rights inter se of various parties of varying nationalities laying claim to the proceeds of a Latvian ship which had been sold under the order of an English Court to satisfy a large number of claims only one of which was preferred by a German or had its origin in Germany.

A second broad answer to this contention of the German necessaries men when it is based, as it is here, upon *The Colorado* (1), appears to me to be found at the threshold of the argument in considering the relative positions of the various opposing parties in the two cases. In *The Colorado* (1) the position of the holder of the " hypothèque " was definitely challenged by a necessaries man. It is not surprising that in such circumstances the Court thought it right to turn to the French law to discover what exactly a " hypothèque " was—especially with a view to comparison with an English mortgage. In the present case the position of the Kohlen Company, but for this novel claim as to their ranking, is challenged by no one and is perfectly well ascertained. They belong to the ordinary class of necessaries men who have supplied the commonest of ship's necessaries at the present day—namely, coal. It is for this reason that I have wondered, when considering this judgment, whether I ought to have admitted evidence upon the nature of their contract at all. Ought I not rather to have followed Lord Sumner (then Hamilton J.) in

(1) [1923] P. 102.

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*American Surety Company of New York* v. *Wrightson* (1), and excluded any such evidence as irrelevant to the law upon which priorities fall to be determined? If one were to adopt this view the plaintiffs' case of course falls to the ground; but, as I have stated above, this objection was not taken, and it would be unfair to decide the point now upon a ground upon which the plaintiffs were not heard. As a matter of distinction, however, between *The Colorado* (2) and the present case, the difference in the two positions is plain to see, and I cannot ignore it. It is to my mind a vital distinction. In the one case the Court seeks instruction in order to deal with an instrument which has only a parallel, and not an exact equivalent, in the English law (see for example Scrutton L.J. in *The Colorado.* (3) "It (the English Court) has also a claim by a person who has a hypothèque, and it may legitimately consult the foreign law as to what a hypothèque is"). In the other it is deliberately invited to invest a class of creditor perfectly well known to English law with certain special attributes on the ground of a foreign law, and moreover, if Dr. Sieveking is right, on the ground of a foreign law which has no operation until arrest has been effected in that foreign land.

When pressed by these difficulties Mr. Carpmael took refuge in a further dictum of Scrutton L.J. in *The Colorado.* (2) Following immediately upon the passage which I have quoted above the Lord Justice says: "It is proved to be, not a right of property in the ship, but a right to arrest the ship in the hands of subsequent owners to satisfy a claim against a previous owner. But such a right is the same as a maritime lien as described by Mellish L.J. in *The Two Ellens* (4), by Gorell Barnes J. in *The Ripon City* (5), and by this Court in *The Tervaete.* (6) And the English Courts administering their own law would give a claim secured by a maritime lien priority over the claim of a necessaries man, who cannot arrest the ship against a subsequent owner.

(1) (1910) 16 Com. Cas. 37.
(2) [1923] P. 102, 109.
(3) [1923] P. 102.
(4) (1872) L. R. 4 P. C. 161.
(5) [1897] P. 226, 241.
(6) [1922] P. 259, 264.

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"The fallacy of the appellants' argument appears to be that because the French Courts would give a French necessaries man, or a necessaries man suing in the Courts of France, priority over the claimant under a hypothèque, therefore an English Court should give an English necessaries man similar priority. The answer is that the appellants are not asking for French remedies, but English remedies; and the English law postpones them to persons who have what is equivalent to a maritime lien."

Turning again to the German Code, Mr. Carpmael pointed out that the Code gives the "ship's creditors," to which class his clients belonged by right of their special contract, the right to follow their claim against subsequent owners. Accordingly he claimed to have a maritime lien as defined by Scrutton L.J. and to be in a better position than the mortgagee and other necessaries men. I am not sure whether Scrutton L.J. would be satisfied that the right conferred upon the German necessaries man by the Code in this case does in fact amount to a maritime lien. The Kohlen Company may be sufficiently attracted by the prospects of solving this problem to take the case a step higher, but in the view which I have formed as to the effects of the evidence, I do not think that I need indulge in speculation upon this topic. If Dr. Sieveking be right, as I think he is, there is no right to follow, no maritime lien, and no special position of "ship's creditors" at all until arrest by the German Court. It is thus idle to consider what an English Court may have said or decided concerning debatable questions as to maritime liens in other and different cases.

Mr. Atkins for the mortgagee claims *The Colorado* (1) as an authority in his favour. It certainly is so to this extent, that it is only one more of the long line of authorities which have established that the English Courts will look to English law and English law only for the purpose of ranking competing claims against a ship or its proceeds. Because in *The Colorado* (1) case the Court, in special circumstances, first turned aside to look at a foreign law, in order to obtain light concerning the

(1) [1923] P. 102.

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legal character of a foreign instrument, I do not think that the case can be claimed as an authority for the introduction of any foreign law which any party chooses to adduce in order to qualify and alter the English rules of ranking. Indeed it is noteworthy that both Hill J. and the Court of Appeal declined to take any note of the French law in the matter outside of the instruction which they derived from the evidence as to the nature of a French " hypothèque." Once they were clear as to what it was, they returned at once to the English law to decide the order of its ranking. I am of opinion, therefore, that Mr. Carpmael's valiant and determined effort to persuade me that *The Colorado* (1) decision affords ground for enabling him to say that his necessaries man has a maritime lien, thus forcing me to disregard the lex fori as to necessaries men, is unavailing.

On this judgment the respective priorities of the claimants other than the Kohlen Company (C) were then argued.

(A) and (B) Casper Edgar & Co. claimed that they had priority over the mortgagee as regards the freight fund, because, although both claimants had equitable assignments of the freight, the priority was determined by the order of date of the notice of assignments, and that they had given notice to the consignees on March 5, 1931, whereas the Court had already held that the mortgagee had at best given merely constructive notice at a later date. It was admitted, however, that apart from notice, as the document which the Court had held to be a good equitable assignment of the freight to the mortgagee was dated April 30, 1929, the mortgagee would have priority. The facts and arguments sufficiently appear from the judgment.

(D) *G. H. Main Thompson* for Metcalfe, Lamb & Co. There is no absolute rule that the claims of necessaries men are postponed to those of the mortgagee, and in the present case equity should give these plaintiffs priority over the mortgagee, for they did repairs to the boilers of the *Zigurds*

(1) [1923] P. 102.

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which increased her value and made her a navigable ship instead of a useless hulk. The repairs were begun before the ship was arrested, and went on afterwards. In such circumstances the Admiralty marshal frequently assumes responsibility, and adds the costs of the repairs to his own costs, but in the present case the marshal did not take that course. The repairs were ordered either by the owner or the master, and the mortgagee, who has got the benefit of them, ought to pay. In *The Scio* (1) the point was not taken that the work had increased the value of the res. [Reference was also made to *The Aline.* (2)]

*H. Atkins* for the mortgagee contra.

(E) *Geoffrey Hutchinson* for the stevedores. These plaintiffs make no claim against the proceeds of the ship, but they should have priority over the freight fund claimed by Casper Edgar & Co. and the mortgagee under the equitable assignments. But for the work performed by the stevedores the cargo would not have been landed and consequently no freight would have been paid. They did work which necessarily had to be done by some one before the freight could be earned. The shipowner would only have got the net freight after paying the stevedores' charges, and an equitable assignee should not be in a better position than the assignor. "He who seeks equity must do equity." Before the master was given a statutory lien for his liabilities payment to a master out of the freight fund was ordered to be made before payment out to the mortgagee: see *Bristow* v. *Whitmore.* (3) Stevedores are in a different position to ordinary necessaries claimants, because the goods supplied by the latter become the property of the shipowner, whereas he is not entitled to the freight until the stevedores have enabled him to claim it. [Reference was also made to *The Orienta* (4); *The Two Ellens* (5); and *El Argentino.* (6)]

*H. Atkins* for the mortgagee. If the argument for the stevedores is sound any necessaries man who has supplied necessaries, e.g. coals, to enable the ship to reach her port,

(1) (1867) L. R. 1 A. & E. 353.
(2) (1839) 1 W. Rob. 111.
(3) (1861) 9 H. L. C. 391.
(4) [1895] P. 49.
(5) (1871) L. R. 3 A. & E. 345, 359.
(6) [1909] P. 236.

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would be preferred to the mortgagee. The only special rights which pertain to stevedores are those given under s. 3 of the Merchant Shipping (Stevedores and Trimmers) Act, 1911. In *Bristow* v. *Whitmore* (1) the circumstances were quite different, and *The Two Ellens* (2), which was the leading authority for the proposition that a mortgagee ranks before persons with only rights in rem, is directly in the mortgagee's favour; so, on the whole, is *El Argentino*. (3)

*Naisby* for Casper Edgar & Co. As against other creditors of the shipowner an equitable assignee can be in a better position than the assignor, inasmuch as the gross freight is assigned and not the net. Indeed, the stevedores have no claim at all on the freight, for, at the time they rendered their service, the freight no longer belonged to the shipowner.

*Hutchinson* replied. The mortgagee is not mortgagee of the freight fund but only of the ship, and the fallacy in the arguments of both the interveners is that they ignore the fact that qua the freight fund the interveners have equitable rights only.

*Cur. adv. vult.*

June 7. LANGTON J. read the following judgment: The points which remain for decision in this matter are pure questions of priorities as between the several claimants. There remain in Court for distribution three sums derived from three different sources, first from the proceeds of the ship 1421*l.* 3*s.* 6*d.*; secondly from proceeds of freight, 1837*l.* 14*s.* 10*d.*; and thirdly, by way of demurrage, 60*l.* In the matter of demurrage there is now no contest in regard to priority. It is agreed that Messrs. Casper Edgar & Co. have unquestioned priority to this small sum. As regards the proceeds of the ship, it is agreed that certain disbursements of the master stand first, and after that the mortgagee upon my findings stands unchallenged in the matter of priority, save as to a claim which struck me as being much more ingenious than sound, which was put forward on behalf of Messrs.

(1) (1861) 9 H. L. C. 391. (2) L. R. 3 A. & E. 345.
(3) [1909] P. 236.

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Metcalfe, Lamb & Co. Mr. Main Thompson contended that his clients were entitled to priority over the mortgagee in respect of both ship fund and freight fund upon the grounds that their work consisted of repairs to boilers which were essential to the existence of the vessel as a ship in being in contrast to a mere useless hulk, and that the repairs of this class stood upon a different footing. He invoked the equitable jurisdiction of the Court, but did not point to any actual authority which would cover or justify this somewhat surprising claim. I do not think it requires much consideration to be satisfied that it is quite unsound. The repairs were ordered by the owner; and the marshal in his discretion declined to take over the work of these repairers. I am satisfied that Metcalfe, Lamb & Co. looked to the owners for payment, and I know of no equitable doctrine which can cause their claim to be preferred to that of the mortgagee in respect of either fund. A somewhat similar contention was once raised as between two sets of necessaries men, in a case to which my attention was called by Mr. Naisby, *The Rene* (1); but Hill J. refused to prefer one class of necessaries man to another in that case, and I cannot doubt that for the same reasons this necessaries man has no claim here to precede the mortgagee.

There remain two major contests which concern the freight fund only, in the first of which Mr. Naisby on behalf of Casper Edgar & Co. claimed priority over the mortgagee on the ground that notice of his equitable assignment was given, on March 5, 1931, to the consignees Messrs. Churchill & Sim, of London, and secondly, the novel and attractive claim put forward by Mr. Hutchinson for priority over both equitable assignees of the freight fund in favour of the stevedores, whose claim originally formed part of the claim put forward by the ship's agents, but was disallowed by the Registrar on the ground that it could not fall upon Casper Edgar & Co. as a liability.

To deal first with Mr. Naisby's contention. His claim was based upon a letter of March 5, 1931, from his clients, Casper Edgar & Co., to Churchill & Sim. The letter is in these terms:

(1) (1922) 16 Asp. M. L. C. 24.

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"Dear Sirs, S.S. *Zigurds*. We beg to give you notice that we hold Captain's authority to collect the freight per this steamer's cargo, against which we have made payments. Yours faithfully, for E. A. Casper Edgar & Co., Ld., (sgd.) D. Edgar, Director." He claimed that this letter constituted notice to Churchill & Sim that the freight had been assigned to his clients. He did not dispute that if he failed in satisfying me that this letter was a good notice, the general rule must prevail, and that priority as between his clients and the mortgagee would fall to be determined by date. Since the date of the mortgage was very much earlier than March 5, 1931, he must consequently fail unless the notice were good. Mr. Atkins for the mortgagee did not contend that if the notice were good he could claim a priority against the ship's agents, but he contended that the letter was altogether insufficient to constitute a notice as required. The point between them therefore narrowed itself to the one point as to the meaning and sufficiency of the letter of March 5, 1931. I have found it, and still find it, an exceedingly difficult point to determine. The words "against which" make it perfectly clear that there is a reason and a good reason why the captain has given his authority to collect the freight. Furthermore, there is to my mind force in Mr. Naisby's contention that the last six words of the letter are mere surplusage unless the intention is to convey to the reader's mind that there is some reason why the consignees ought to pay this freight to the ship's agents. I have had to ask myself the question how far must a notice go in order to be good and sufficient for the purpose here required. Mr. Atkins, for the mortgagee, cited a passage from the judgment of Kindersley V.-C. in *Browne* v. *Savage* (1), in which he says: ". . . . a verbal and informal notice is sufficient, provided the fact of the assignment is distinctly and clearly brought to the mind and attention of the trustee." Mr. Atkins put this as the minimum requirement, and said that the letter of March 5 does not even suggest an assignment to the mind of the reader. When one considers, however, that the reader was a most experienced

(1) (1859) 4 Drew. 635, 640.

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business man, who could not possibly be interested in the mere fact that Casper Edgar & Co. had made payment against the freight, it seems to me that this reading puts too low a value upon the last six words in the letter. The conclusion to which I have come, after considerable doubt and hesitation, is that these words might convey to an experienced business man that an assignment had already taken place, but they are not so clear and conclusive as to be an actual notice of an assignment. As I understand the matter a communication which might suggest an assignment to one man, but would not necessarily suggest it to another, is not enough for Mr. Naisby's purpose. Accordingly, in my view, Casper Edgar & Co. fail in their contention, and the mortgagee takes priority over them upon this branch of the claim.

The stevedores' claim was put in two ways by Mr. Hutchinson, the second of which has given me very considerable food for thought. To begin with, he claimed priority over the mortgagee for his clients, the stevedores, on the ground that it was through their exertions that the freight fund was brought into existence at all. There is a certain echo in this of the claim put forward by necessaries men against other necessaries men in the case which I alluded to above, *The Rene*. (1) It has also a certain kinship to the claim, of which I have already disposed, put forward in this case on behalf of Metcalfe, Lamb & Co. by Mr. Main Thompson. To my mind this is putting the services of the stevedores altogether too high and in the wrong light. It is possible to have great sympathy with them, as Hill J. had with the claimants in *The Rene* (1), without presenting them in the false light of a quasi salvor. The so-called services or exertions which they contributed to the adventure of the *Zigurds* are not in reality in the least akin to salvage services or exertions. In plain fact they are nothing more than ordinary commercial labour rendered upon agreed conditions at a regulated rate of hire.

The second angle, however, from which Mr. Hutchinson approached this point was far more convincing. The mortgagee, he said, is here claiming an equitable jurisdiction

(1) 16 Asp. M. L. C. 24.

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of the Court. He comes here asking for the proceeds of the freight upon an equitable assignment. It is a principle of equity that he who claims equity should do equity. If he does not pay the stevedores' charges he will be getting more than the owners could ever have got, he will pro tanto be getting the gross freight and not the net freight. Why, he asks, should a man whose claim is based upon equity not pay the just amount to persons whose work has contributed to bringing that fund into being ? He did not pretend that there was any authority precisely in point, but he cited to me *Bristow* v. *Whitmore* (1) to reinforce his proposition that the Court of equity would not be slow to interfere to see justice done to a ship's master as against a mortgagee. It is worthy of note that in that case the Lord Chancellor (Lord Campbell), after stating in the widest terms that : " The plaintiff's claim is most reasonable, and natural justice requires that it should be conceded," goes on immediately afterwards to say : " Still, if it is opposed to any established rule of law, or if it can be admitted only by drawing a nice and subtle distinction between this case and former decisions establishing a settled rule, it ought to be disallowed." I think Mr. Hutchinson was right in saying that there is no established rule of law which applies to the present case, but I doubt whether the matter is so entirely at large as he would have me to believe. It is true that the assignment conveyed by the mortgage is not, as I have found the matter, a legal assignment of the freight, but I have found an equitable assignment in the hands of the mortgagee springing from this mortgage. People who deal in shipping affairs and with ships must be taken to do so with their eyes open to the ordinary risks and liabilities incident to these affairs. No one who was conversant with maritime affairs could pretend to surprise on learning that a ship was sailing the seas under the burden of a mortgage ; nor would it be surprising to learn that the mortgage deed secured to the mortgagee at least an equitable assignment of freights earned. If I were to accede to Mr. Hutchinson's argument I should find myself at once in a very considerable

(1) 9 H. L. C. 391, 400.

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quandary as to the position of Casper Edgar & Co. vis-à-vis the mortgagee. I should have to ask myself whether there is in fact anything specially meritorious about the performance of stevedore work which entitles it to be put upon a different footing to the work performed by ship's agents which has been equally necessary to bring this freight fund into being. As I understand the facts of this case, the stevedores were in fact brought on the scene by the exertions of Casper Edgar & Co., and if their claim to be paid stands upon a special footing, I find it difficult to see why the claim of Casper Edgar & Co. does not equally stand upon a special or even better footing.

I am afraid that the truth of the whole matter is, whichever way one looks at it, that it is beset with perplexities, and some perfectly innocent people have obviously got to suffer. To my mind it would be better to follow here a general rule and give the priority to the mortgagee.

The final result, therefore, is as follows :—First comes the costs of arrest of ship and freight down to the issue of the writ; Casper Edgar & Co. are entitled to the demurrage; the master is then entitled to 527*l.* 19*s.* 1*d.* in respect of his disbursements, with interest; and the mortgagee is entitled to the whole of the balance.

After argument on the question of costs, his Lordship said that each claimant had opposed every other claimant and no one had been entirely successful. The case was unique and he hoped it would remain so, and he did not want the order which he was going to make to be taken as a precedent. He thought the right order was that each party should bear his own costs.

Solicitors for Casper Edgar & Co.: *Middleton, Lewis & Clarke, for Middleton & Co., Sunderland.*

Solicitors for the mortgagee: *Constant & Constant.*

Solicitors for the Kohlen Company: *Stokes & Stokes, for Bramwell, Clayton & Clayton, Newcastle-on-Tyne.*

Solicitors for Metcalfe, Lamb & Co.: *Parker, Garrett & Co., for Botterell, Roche & Temperley, West Hartlepool.*

Solicitor for the stevedores: *Charles M. Finney.*

E. C. M. T.

*Followed.* *Re* ST. SAVIOUR'S, WALTHAMSTOW. [1950] 2 All E.R. 70.

*Considered.* *In re* ST. SAVIOUR'S, WALTHAMSTOW [1951] P. 147



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*April* 16, 21, 26; *May* 7.

## *In re* ST. SAVIOUR'S, HAMPSTEAD.

*Ecclesiastical Law—Faculty—Removal of Ornaments introduced without Faculty—Six Candlesticks on Retable—Presence of Crucifix at Place appointed for hearing Confessions.*

The old English use in parish churches being to place not more than two and at least one light on the Holy Table in service time, this was retained at the Reformation. Consequently the use of six lights on the Holy Table or a retable is unlawful.

The vicar of a parish having introduced without a faculty six candlesticks placed on a retable behind the Holy Table, the Chancellor granted a confirmatory faculty for two of them. Upon an undertaking being given by the vicar that the remaining four should not be used on or in connection with the Holy Table, their removal from the church was not insisted on.

In the absence of evidence of superstitious reverence or use the placing of a crucifix so as to be visible to the penitent during confession is not unlawful.

PETITION for a faculty.

At a sitting of the Consistory Court for the diocese of London, before the Chancellor, Mr. F. H. L. Errington, four petitioners, Dorothy Wilson, James Henry Ernest Brock, Elizabeth Carmichael (since deceased) and Mary Wilson, petitioned for the removal of six candlesticks and a plated crucifix from the retable behind the Holy Table and of a crucifix facing a confessional prayer desk within the communion rails in the church of St. Saviour's, Hampstead, on the ground that the candlesticks and crucifixes were likely to lead to superstitious use and superstitious reverence and were illegal. They further petitioned for the reinstatement of an enamelled copper cross and a pair of copper candlesticks. No faculties had been obtained in respect of any of the above ornaments.

By the act on petition the parties opponent, the vicar, the Reverend Cecil Arthur Stewart Luxmoore-Ball, Herbert George Boulting and William Henry Fleeming, churchwardens, and the parochial church council, denied that the crucifixes and candlesticks were likely to lead to superstitious use or were illegal. They said that the petitioners did not represent the wishes of the general body of worshippers in the said

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church. They further petitioned for a confirmatory faculty authorizing the retention of the said crucifix and six candlesticks.

The following statement of the facts is taken from the Chancellor's judgment :—

The late vicar, the Reverend Edward Koch, in the year 1915, placed on the Holy Table of the church as a thank-offering for the first year of his ministry an enamelled copper cross, and in 1917 two copper candlesticks presented by a Mr. Hose and his sister in memory of their father, who had served the parish as a curate for some fifty-five years, were added. Both cross and candlesticks were made by Miss Agnes Lee, an artist living in the parish, and they were introduced into the church without a faculty. The present vicar, the Reverend Luxmoore-Ball, was instituted in December, 1930. Before entering upon his duties, he had given an explanation in the parish magazine, at the instance of Mr. Koch, of certain changes he proposed making in the times and character of the services, and these changes he introduced forthwith. Shortly after institution he arranged for confessions to be heard at the present prayer desk, and placed the small crucifix complained of on the panel. Some short time afterwards he purchased a cross and six candlesticks, all silver-plated, and on Easter Eve, 1931, he placed them on the retable, thus providing six lights for the 11 o'clock celebration. These ornaments were introduced without a faculty. Immediately before this, and also without proper sanction, he had taken the copper cross off its base and turned it into a processional cross. Mr. Koch was not consulted, and indeed only heard of it accidentally. The vicar says he was unaware that the cross had been given by Mr. Koch. He made, however, no inquiries. He further removed the two candlesticks from the Holy Table, but continues to use them as two lights at plain celebrations. Mr. Hose, who presented them, has given evidence, and is ardently in favour of the change.

In April, 1931, the Archdeacon of Hampstead, at his annual visitation, warned the churchwardens of the necessity for a

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faculty to legalize both what had been removed and what had been added, and the churchwardens immediately reported this to the vicar. In the words of both the vicar and the churchwardens, they "considered the matter." The necessity for a faculty was again raised by a Mrs. Holt at a meeting of the parochial church council on June 1, 1931: she was told it was a question of ways and means, and that they were considering the matter. I can only conclude from the evidence that it is very doubtful whether this confirmatory faculty would have got beyond the stage of consideration had not the hands of the parties opponent been forced by the present petition. I should add that the vicar personally and by his counsel has made ample apology for the contempt of which he has been guilty, and I accept that apology.

On November 2, 1931, the parochial church council by a large majority resolved to oppose the present petition and apply for a confirmatory faculty.

*W. S. Morrison* for the petitioners. All the articles prayed against were instituted without a faculty and are therefore in the church illegally, and no attempt was made to remedy this until this petition was launched, although there had been a previous warning by the Archdeacon. The confirmatory faculty prayed for ought, therefore, to be refused.

The crucifixes should be removed, because they are liable to superstitious use. One is on the Holy Table, the centre to which the genuflexions of the clergy and the worship of the congregation are directed; the other is hung before the penitent in confession, and is conjoined with a form of words copied from the Roman ritual. They are isolated and are not legal architectural decoration but illegal images: see the judgment of the Privy Council in *Westerton* v. *Liddell* (1) and *In re Tenbury Parish Church* (2) and the cases there cited.

The articles prayed against are not sanctioned by the Ornaments Rubric, by reference to which their legality is to be tested. They are all ornaments in the strict sense for this purpose, which is that of the word "ornamentum,"

(1) (1855) Moore's Special Report, 1, 175. (2) (1919) 36 Times L. R. 188.

which according to Forcellini's Lexicon is used "pro quocumque apparatu, seu instrumento": see *Westerton* v. *Liddell* (1) and *Kensit* v. *St. Ethelburga, Bishopsgate Within* (*Rector*). (2) These articles are all used as part of the apparatus of worship in this church. The true test of the legality of the crucifixes and six candlesticks is whether they were in use in the second year of Edward VI., and there is no authority showing that they were. In *Vincent* v. *St. Magnus the Martyr* (*Rector*) (3) the test applied was liability to abuse, but the above suggested stricter test was not disapproved. (4)

The use of six candlesticks upon or in connection with the Holy Table is illegal as contrary to the English Use and Ornaments Rubric. In *Read* v. *Bishop of Lincoln* (5) two lights only were sanctioned. See also *Sumner* v. *Wix* (6); *Elphinstone* v. *Purchas* (7); and *Capel St. Mary, Suffolk* (*Rector*) v. *Packard*. (8) In the last named case four out of six candlesticks were directed to be removed. It is true that the ornaments—namely, the two candlesticks, whose return to the Holy Table is prayed for—were placed there without a faculty having been obtained, but this is mitigated by the fact that they were mere replacements, and in such matters the Court will allow a certain discretion in the incumbent: *Maidman* v. *Malpas*. (9) Although the two candlesticks were illegally introduced without a faculty, their removal by the present incumbent without a faculty was also illegal: *Ritchings* v. *Cordingley*. (10)

*Macmorran K.C.* for the parties opponent. In the absence of proof of any superstitious use of the crucifixes—and none was proved here—the Court should exercise its discretion in favour of the parties opponent: see *Vincent* v. *St. Magnus the Martyr* (*Rector*) (3) and *Capel St. Mary, Suffolk* (*Rector*) v. *Packard*. (8)

(1) Moore's Special Report, 1, 156.
(2) [1900] P. 80, 97.
(3) [1925] P. 1.
(4) Ibid. 16.
(5) [1892] A. C. 644.
(6) (1870) L. R. 3 A. & E. 58.
(7) (1870) L. R. 3 A. & E. 66.
(8) [1927] P. 289.
(9) (1794) 1 Hagg. (Cons.) 205, 208.
(10) (1868) L. R. 3 A. & E. 113.

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With regard to the *Bishop of Lincoln's* case (1), the only decision was that a clergyman does not commit an offence by lighting two candles only. The rest of the decision was obiter, and it is not correct to say that it decides that more than two are illegal ornaments. Six candles may be required for illumination, and as such may be allowed in a faculty case.

*W. S. Morrison* in reply. The question is whether an ignorant person coming to the church would use the crucifixes in a superstitious manner, not whether the present incumbent or his congregation would do so.

*Cur. adv. vult.*

1932. May 7. THE CHANCELLOR (MR. F. H. L. ERRINGTON), having stated the facts as set out above, continued: It may be useful to refer to the general principles guiding this Court in faculty cases. It has first to be borne in mind that they have no relation to criminal proceedings against a clergyman for illegal services or ceremonies. Evidence as to such services or ceremonies, though it cannot be wholly rejected, is only relevant so far as it indicates a danger of the ornaments complained of being used for superstitious purposes. In the absence of such evidence the object of the faculty jurisdiction is not to hamper a clergyman by impeding his work. He is responsible for the religious welfare of his parish, and it is not the province of this Court to criticize his teaching; still less to discourage his efforts by withdrawing such symbolic help as church decorations may give. On the other hand, there are of course certain ornaments which the Court has no power to sanction, as being outside the Ornaments Rubric. Where the question may be in doubt, this Court will pay special attention to the ancient English use, but will view with disfavour ornaments connected with Roman practices of post-Reformation origin. Confusing the boundaries is hardly the right approach even to reunion.

Some question has been raised by the parties opponent as to the bona fides of the petitioners and their supporters.

(1) [1892] A. C. 644.

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I find nothing in their records to support such a suggestion. Those who have given evidence have been communicant members of the congregation for many years and have taken a prominent part in parish activities. They evidently prefer a friend of seventeen years to an acquaintance of a year and a half. They resent, and I cannot blame them, the vicar's arbitrary action in removing the cross given by Mr. Koch and converting it into something for which it was not intended. From the changes in the services they are suspicious of the use to which the new ornaments may be put. They gave their evidence quite fairly, and I have come to the conclusion that they are genuinely, though I think needlessly, perturbed in their minds as to these ornaments. Not content, however, with questioning the good faith of his parishioners, the vicar, through his counsel, has made a violent attack on his predecessor. He accuses Mr. Koch of stirring up an agitation among his parishioners, in fact as being, in the language used by his counsel, the villain of the piece. Mr. Koch was a necessary witness, and was cross-examined. It is due to him to say at once, and to say emphatically, that there is not a particle of evidence to support such a sweeping accusation. Indeed, the contrary is rather the case. The letter which Mr. Koch wrote to the vicar on first hearing of the change was a model of forbearance, and in the witness-box he has shown no trace of the indignation which he might legitimately have expressed. I shall again have to refer to the subject when I come to the question of costs.

Dealing now with the actual application before me, I will take first the application to restore the copper cross and candlesticks to their original position. Had they been introduced by faculty this would naturally have followed. They were not, and I cannot force them on the church in face of the opposition of the vicar and the parochial church council, who represent the parish. The candlesticks can be and are used, and I sanction their retention ; but the copper cross should be returned to Mr. Koch.

With regard to the two crucifixes I do not find, as Mr. Morrison for the petitioners contends, that they are used

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as adjuncts to unlawful services or ceremonies, or that they are, or are likely to be, objects of superstitious reverence. It has been suggested that the identity of the form of confession used in this church with the Roman form involves a superstitious use of the small crucifix. I am unable to follow this. Compulsory confession is not taught, though the practice of confession is encouraged. I can see no superstition in the penitent having before his eyes this representation of his crucified Saviour. As to the crucifix on the retable, I have no real evidence of any superstitious reverence or use. In these circumstances I confirm the placing in the church of both crucifixes.

I come now to the six candlesticks on the retable, the candles in which are alight during the midday sung celebration. At first sight it may no doubt be said, two lights having been pronounced lawful, why not six? I would cite here a passage, from the admirable foreword to the Prayer Book, "Of Ceremonies," which applies equally to such ornaments as these: "And although the keeping or omitting of a ceremony, in itself considered, is but a small thing; yet the wilful and contemptuous transgression and breaking of a common order and discipline is no small offence before God." Now in *Read* v. *Bishop of Lincoln* (1) the Archbishop of Canterbury decided that the law is not broken by the mere fact of two lighted candles standing on the Holy Table during the Communion service. Mr. Macmorran, for the vicar, has argued that no implication of the illegality of more numerous lights arises from that case, and that it cannot be regarded as establishing any general rule. I do not agree with him. Having regard to the exhaustive research into the question of lights both in pre-Reformation and post-Reformation days apparent in the Archbishop's judgment and the annexed tables (2), I think his judgment implies that the ancient English use in parish churches was two lights, or at least one, upon the altar to signify that Christ was the very true Light of the World, and that, while other lights connected with

(1) [1891] P. 9. Affirmed by the Privy Council [1892] A. C. 644.
(2) [1891] P. 95.

the altar were forbidden at the Reformation, the ancient use prevailed. This was in fact accepted in *Capel St. Mary, Suffolk* (*Rector*) v. *Packard* (1) as the Archbishop's ruling, and it will be noticed that Sir Henry Slesser, who argued the case for the appellants, said (2) that he could not contend that all the six candlesticks on the retable could be retained, but that two were permissible. I need hardly emphasize the importance of a ruling by the Archbishop on a point of good order. The Roman Church attaches, as I understand, no symbolic meaning to six lights on the altar other than as representing the Light without which even at midday we stumble in darkness, but its rules formally require two lights at Low Mass and six at High Mass. Mr. Luxmoore-Ball tells me that it is only uninstructed people who differ from him. No doubt many of us hold similar views : we seldom express them quite so frankly. If such a person came to Mr. Luxmoore-Ball and asked for instruction as to why he had two lights at a plain celebration and six at a sung celebration, I think he would feel obliged to suggest that it was a rule of the Church ; if asked " What Church ? " he might possibly find it convenient to turn to another subject of instruction.

I will confirm the placing of two candlesticks on the retable, and I will not require the removal of the other four from the church provided I have a satisfactory undertaking by Mr. Luxmoore-Ball as to their use. The confirmatory faculty will be, in each case, until further order.

It only remains to deal with the question of costs. It is a pity that before making changes the vicar did not await the result of personal contact. Time nowadays is on the side of change ; and religious aspirations realized in a hurry are apt to have an unfortunate aftermath. The present trouble has been caused by deliberate neglect of the salutary rule supplementing the Bishop's oversight of his clergy by his judicial oversight of all churches in his diocese and their equipment. The vicar's previous incumbencies have been in Scotland, and he tells me that he knew nothing about faculties. I accept this, though it seems strange that a

(1) [1927] P. 289. (2) [1927] P. 294.

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clergyman accepting the protection our law gives to his benefice should not acquaint himself with the accompanying legal responsibilities, and that his churchwardens, officers of this Court, did not give him the necessary instruction. In any case he knew in April, 1931, of the Archdeacon's warning to the churchwardens, and neither he nor they acted on that warning until forced by the present petition. Nor can I be unmindful of the vicar's high-handed dealing with the cross which he found on the Holy Table, or the attack, unjustified by any evidence, he made on the giver of the cross, Mr. Koch. On the other hand the petitioners, while they have justified their petition, have only been partly successful. In these circumstances I order the parties opponent to pay three-quarters of the taxed costs.

Solicitors for petitioners: *Wainwright & Co.*
Solicitors for parties opponent: *Day & Son.*

W. L. L. B.

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*March* 1, 2; *May* 3, 4; *June* 6.

## THE CASTOR.

*Shipping—Salvage—Value of salved Ship—Basis of Appraisement—Ship under Time Charter—Charter not disclosed to Valuer—Appraisement not binding.*

In a salvage action the plaintiffs obtained an order for the appraisement of the defendants' ship. The valuer appraised the ship on the footing that she was employed and likely to be employed, but the fact that she was under a profitable time charter which had nearly seven years unexpired was not disclosed to the valuer:—

*Held*, that an appraisement should be based on the value of a ship to her owners as a going concern; that the earning power under the charterparty should be taken into account as one of the elements of value; that accordingly the appraisement was not conclusive; and, on further evidence adduced in Court, that the value should be raised from 72,820*l.* to 85,000*l.*

*The San Onofre* [1917] P. 96 considered and explained.

ACTION OF SALVAGE.

The plaintiffs, the owners, master and crew of the steamship *Ousebridge*, of West Hartlepool, claimed salvage remuneration

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in respect of services rendered to the defendants' oil tanker *Castor* in the Atlantic in April and May, 1931.

The *Castor*, while bound from Curacoa to Lisbon with a cargo of oil, caught fire in her engine-room. The fire rapidly spread, and the crew had to take to the boats. Subsequently, when the *Ousebridge* came up, the master and five others returned to the *Castor*, which was taken in tow by the *Ousebridge* and towed to Ponta Delgada in the Azores, a distance of about 180 miles.

In the defendants' affidavit of value the damaged value of the *Castor* for the purposes of the action was stated to be 69,714*l.* 14*s.* 7*d.* The plaintiffs, being dissatisfied with this valuation, obtained an order for a commission of appraisement, and the marshal's valuer assessed the value of the *Castor* at 72,820*l.* The plaintiffs still believed the vessel to have been undervalued, and at the hearing asked leave to call evidence as to the value. The learned President ascertained from the valuer that he had appraised the value on the footing that the *Castor* was an employed ship, but that he had not been informed that she was under time charter to the Anglo Saxon Petroleum Company at remunerative rates for a term of years of which nearly seven remained unexpired. The defendants contended that the appraisement was made on the right basis and was conclusive, but the Court allowed the plaintiffs to adduce further evidence de bene esse. The value of the *Castor's* cargo was agreed at 20,828*l.*

*C. R. Dunlop K.C.* and *J. V. Naisby* for the plaintiffs. The basis of the valuation of a ship is the value to her owners as a going concern: *The Harmonides* (1); *The Edison* (2), and this basis is equally applicable in salvage as in damage cases: *The Hohenzollern.* (3) As a going concern a profitable time charter is an important element to be taken into account, for if the *Castor* had been lost her owners would have lost the benefit of some 12,000*l.* for nearly seven years. The plaintiffs saved the benefit of that charterparty freight to the

(1) [1903] P. 1. (2) [1932] P. 52, 65.
(3) [1906] P. 339.

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defendants, and there is no rule of law which prevents that fact being taken into account. Chartered freight is just as much the subject of salvage as bill of lading freight. The observations of Sir Samuel Evans in *The San Onofre* (1)—the converse of this case—were not of general application, and were not intended to infringe the principles laid down in *The Harmonides* (2) and *The Hohenzollern.* (3) The appraisement, therefore, is not conclusive, and the enhanced value of the *Castor* based on the time charter should be added to the figure arrived at by the valuer.

[Reference was also made to *The Fusilier* (4); *Five Steel Barges* (5); *The Cargo ex Port Victor* (6); *Duncan* v. *Dundee Shipping Co.* (7); and Kennedy's Civil Salvage, 2nd ed., p. 8.]

*E. A. Digby K.C.* and *K. S. Carpmael* for the defendants. The evidence admitted de bene esse should be rejected, for the appraisement was made on the right basis—namely, the market value of the ship: see *The San Onofre* (1), where Sir Samuel Evans said that if in the absence of bail a ship were sold "she would not be sold subject to charterparties," and that in no case, so far as he was aware, "have the charters of a vessel been taken into account in assessing the value of a salved ship in salvage proceedings." *Five Steel Barges* (5) and *The Cargo ex Port Victor* (6) were concerned, not with the amount of the fund, but with who was to be sued, and in *The Harmonides* (2) there were very special facts, and the principle there stated must be taken to be limited by the later decision in *The San Onofre* (1), and is only applicable to a special class of case—namely, where the property is totally lost. The plaintiffs cannot get an award based on both the value of the ship and the profits she would earn: see the observations of Scrutton L.J. in *The Edison.* (8) "It is only in very exceptional cases" that the Court will

(1) [1917] P. 96.
(2) [1903] P. 1.
(3) [1906] P. 339.
(4) (1865) Br. & Lush. 341, 347.
(5) (1890) 15 P. D. 142, 146.
(6) [1901] P. 243, 246, 255.
(7) (1878) 5 R. 742.
(8) [1932] P. 52, 65.

allow an appraisement to be set aside : per Sir Samuel Evans in *The San Onofre.* (1)

*Dunlop K.C.* replied.

*Cur. adv. vult.*

June 6. THE PRESIDENT (LORD MERRIVALE) read the following judgment : The question in this case is what is the due reward for salvage services rendered in April and May, 1931, by the plaintiffs' steamship *Ousebridge* to the defendants' motor vessel *Castor.* Difficulties of more than the usual character have attended the determination of the matter.

The *Castor* is a twin-screw motor vessel belonging to a company established at the Port of Trelleborg, in Sweden, and is of 8714 tons gross register. She cost, to build, 65,000*l.* She carried a crew of forty hands. The *Ousebridge* is a steel screw steamship, registered at West Hartlepool, of 5601 tons gross, fitted with triple expansion engines of 477 h.p. nominal, and was manned by a crew of thirty-five hands. Her value was stated at 53,500*l.*, and the cargo and freight at risk at an additional sum of 13,170*l.* [His Lordship then dealt with the details of the salvage service, which are not material to this report, and said that he was satisfied that when the *Ousebridge* took the *Castor* in tow the worst period of the fire had passed, and there was no strong probability that the fire would spread forward ; but the *Ousebridge* stood by and made fast when all believed that the actual peril to the *Castor* was very great, and when it was reasonably thought there was risk of possible explosion. His Lordship continued as follows :] In addition to the controverted questions as to what was done by the *Ousebridge*, and what was its effect, there was a stubborn contest at the hearing as to the value of the property salved and a serious conflict as to the principle on which the value must be determined. Ordinarily an appraisement of the ship, a valuation of her cargo, and a simple adjustment of relevant matters of account will provide the material for arithmetical ascertainment of the values on question. Here, however, a question of general importance

(1) [1917] P. 96, 99.

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has been raised—namely, whether in valuing the res in salvage cases the Court can have regard to a charterparty in force at the time in question. This came about by reason that when the *Castor* was salved she was under time charter with nearly seven years to run.

The *Castor* had been built under the terms of a contract made in December, 1926, between her owners and the Anglo Saxon Petroleum Company, Ld., which determined the design and structure of the ship to be built, and gave the company an interest in her as soon as she should be completed, the principal term being that she should be under hire to the company for a term of years at fixed rates for the carriage of oil at 6*s.* 10½*d.* per ton per month upon a dead weight capacity of 12,500 tons. Hence the charterparty. The *Castor's* gross earnings thereunder for a year were estimated by one of the witnesses at about 46,000*l.*, and after payment of working expenses and allowances for various charges, including an allowance for depreciation, it was said on the plaintiffs' part that there was a net profit accruing to the owners under the charterparty of upwards of 12,000*l.* per annum, and it was contended that the charterparty having nearly seven years to run, the present value of the prospective earnings of the *Castor* during that period must be taken into account as an element of value additional to her appraised value of 72,820*l.* as a damaged ship. Mr. Dunlop also suggested in his final argument that the prospective earnings under the charterparty, if not treated as an element in the value of the vessel, ought to be regarded as freight at risk and part of the property or interest of her owners salved for them by the *Ousebridge*.

For the defendants the figures I have mentioned were not at all admitted. They regarded the net profit as only 4000*l.* It was contended by Mr. Digby that the value to be taken into account was the appraised value and no more.

In view of this conflict I thought it was necessary to ascertain from the valuer by whom the appraisement of the *Castor* had been made whether he had valued upon the footing that the vessel was on hire to the charterers on the terms of the actual charterparty, and I learned and so informed the

parties that the charterparty had not been before the valuer. The vessel had been valued simply on the footing only of her actual employment. Evidence was given by expert witnesses as to the value of the *Castor* to her owners under the charterparty, and counsel discussed the question of value on this footing in light of a number of well known legal authorities.

The outstanding cases cited were: *Five Steel Barges* (1); *The Harmonides* (2); and *The Hohenzollern* (3); and, in contrast with these, the decision of Sir Samuel Evans P. in *The San Onofre.* (4) The judgments in the recent case of *The Edison* (5) in the Court of Appeal were also mentioned. The substantial dispute, however, was whether the decision of the Court in *The San Onofre* (4) limits or qualifies the principles applied in the earlier cases. As the question affects everyday practice, it has been necessary to examine the cases closely.

Lord Hannen's judgment in the case of *Five Steel Barges* (1) is useful for the reminder it gives that salvage cases are not mechanically uniform in process or in effect. It was a personal action against barge builders to establish a salvage claim in respect of services rendered to five barges whereof two, though still under the builders' control, had passed to the Government for which they were built. Lord Hannen, in holding that payment for salvage was recoverable in respect of the possessory interest of the builders in these two barges, gave his well known pronouncement on the principles which in our Courts govern every salvage award. "It is," he said, "a legal liability arising out of the fact that property has been saved, that the owner of the property who has had the benefit of it shall make remuneration to those who have conferred the benefit upon him. . . . . I think that proposition equally applies to the man who has had a benefit arising out of the saving of the property. . . . . The same moral obligation to which the law has given force in the case of an owner applies to those who have an interest in the

(1) 15 P. D. 142, 146, 147.
(2) [1903] P. 1, 6.
(3) [1906] P. 339.
(4) [1917] P. 96.
(5) [1932] P. 52.

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property." The jurisdiction in salvage cases Lord Hannen also described as one of " a peculiarly equitable character."

As to the test of value in these cases, *The Harmonides* (1) and *The Hohenzollern* (2) were accepted by counsel on both sides as authoritative decisions. *The Harmonides* (1), like *The Edison* (3), was a case of ascertainment of value of a ship sunk in collision, but the test applicable appears to be the same in case of salvage. That this was Lord Gorell's view appears from the proceedings in *The Hohenzollern*. (2) What Lord Gorell had defined as the test in the damage case of *The Harmonides* (1) was " What is the value to the owners as a going concern of the vessel in question at the material time ? " ; and in *The Hohenzollern* (2), Bargrave Deane J., after consultation with Lord Gorell P., assessed salvage upon the footing that the value was what the ship was worth in her damaged state to her owners.

Substantially the case of the defendants is that the judgment in *The San Onofre* (4) limits the operation of the earlier decisions by establishing as a legal principle that in determining the value of a salved vessel for salvage purposes contractual arrangements which exist between the owners and charterers of the ship must be excluded from consideration.

The facts as to *The San Onofre* (4) can be shortly stated. She, like the *Castor*, was a vessel built for the purpose of being chartered to an oil company under a time charter. The time charter was in force with fourteen years to run at the date of the salvage. Her owners declared her value in her damaged condition to be not more than 160,000*l*., that being the sum at which she stood in their books, with due allowance for depreciation and repair of damage. At the instance of the salvors, however, appraisement had been made in the ordinary course, and the value had been thereby fixed at nearly 370,000*l*. as " the market value of the vessel as a going concern at the date of the completion of the salvage services." This larger value was held by the Court to be the value upon

(1) [1903] P. 1.
(2) [1906] P. 339.
(3) [1932] P. 52.
(4) [1917] P. 96, 99, 100.

which the reward for the salvage services must be determined. Certain passages in the judgment in *The San Onofre* (1) were specifically relied upon for the defendants, and three in particular: " In no case, so far as I am aware," the President said, " have the charters of a vessel been taken into account in assessing the value of a salved ship in salvage proceedings." Also this: " The ship is salved, and may be arrested as she is, as the salvors are entitled to arrest the res. If bail is not given the ship may be sold. She would not be sold subject to charterparties, but as she existed to any one who wanted to buy a ship of her description." And further this: " The Court has nothing to do with the relationship between the shipowners and the charterers; nor in my opinion have the salvors anything to do with any such question."

Read by themselves, as if they were statements of principle applicable in all cases, the words cited would perhaps establish the defendants' contention. They must, however, be applied to the facts with which the judgment deals. This is illustrated in respect of the question whether charterparties may ever be taken into account in assessing value for salvage by a case reported in the same volume of the Law Reports with *The San Onofre* (2), that of *The Kaffir Prince*. (3) There, in determining a salvage award, the learned President took into account as an element in the value of the salved ship freight which the vessel was, by reason of the salvage, enabled to earn under a charterparty which was in being at the time of the salvage. In *The Kate* (4), a damage case, Lord St. Helier had treated the charterparty as a material element of value.

So far as I am able to see, there is nothing in *The San Onofre* (2) which in any way infringes, or was intended to infringe, the principle laid down in *The Hohenzollern*. (5) All parties interested in the res were before the Court, and were interested in the salvage claim and the amount of the award. Two sets of rights, proprietory and possessory, had been

(1) [1917] P. 96, 99, 100.
(2) [1917] P. 96.
(3) [1917] P. 26.
(4) [1899] P. 165.
(5) [1906] P. 339.

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benefited, and an award was made on the footing of the full value of the whole. The actual judgment does nothing exceptional. Upon an appraisement salvage was awarded. In what proportions the sum payable was divided as between the owners and charterers is not reported. Apparently they did not differ about it. As the vessel was not sold by auction it did not become necessary to determine whether by virtue of such sale the owners would become entitled to the whole balance of the purchase money on the footing that the charterparty had become discharged by operation of law. Had such a claim been made I cannot doubt that the equitable nature of the Admiralty jurisdiction in cases of salvage would have been vindicated.

As in the case of *The Hohenzollern* (1), what has to be determined here is what is the value of the *Castor* to her owners as a going concern? What was she worth in her damaged state to her owners? The view I have expressed seems to me consistent with the judgments of the Court of Appeal in the recent case of *The Edison* (2), to which both parties referred. There, in the case of a vessel lost by collision damage, Scrutton L.J. cited the judgment of Lord Gorell in *The Harmonides* (3), and added words which directly affect the present inquiry. "The value of the ship," he said, "is an estimate, or rough capitalization, of the earning power of the ship for its life," and he added this: "You cannot give both the value of the ship and the profits it would probably earn."

Bearing the authorities in mind, what seems to me fallacious in the contention for the plaintiffs here is that, after an appraisement which was manifestly based on some earning power, they assert a right to enhance the appraised value by adding thereto the capitalized value of the ship's whole earning power under a charterparty. On the other hand, it seems to me inconsistent with authority and wrong in principle to exclude from consideration the earning power of the *Castor* under the charterparty, under which so long as

(1) [1906] P. 339. (2) [1932] P. 52, 65.
(3) [1903] P. 1.

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it subsists she could alone earn money for her owners. The appraisement, as I have said, proceeds on the footing that the ship is an employed ship likely to be employed. To determine whether the agreed employment enhances the value so arrived at I have made the necessary further inquiries of the valuer. He advises me that the rate of hire is not exceptional so as to call for any adjustment on that ground, but that the agreed duration of the charterparty is an element of value proper for consideration in determining the *Castor's* value to her owners as a going concern. Acting to the best of my judgment upon the valuer's advice, I determine the salved value of the *Castor* at 85,000*l.*

There was no dispute between the parties as to the salved value of the cargo. Taking account of expenses involved amounting to 3938*l.*, the value of the cargo at Lisbon was 20,828*l.*

Having arrived at the values of the salved ship and cargo, I have to determine what should be the reward for the services rendered in salvage. It must be borne in mind that the salvage service involved loss of the *Ousebridge's* services to her owners for a period of six days twenty hours, various expenses amounting to 1177*l.*, and 117*l.* in expenses incurred by reason of an accident which happened to one of the seamen. It is also material in respect of the claim of the owners of the *Ousebridge* that for several days their property, worth nearly 70,000*l.*, was exposed to risks involved in the salvage undertaking with no other prospect of compensation than that which depended upon the safe delivery of the *Castor* in port.

As to the master and crew of the *Ousebridge*, they undertook their task in face of some real risks which were inevitable and of possible risks which might well have been alarming; and for the master the responsibility he took, as well as his actual risk and labour, must be taken into consideration.

On the whole, I have come to the conclusion that the sum of 11,500*l.* would not be an excessive award for the salvage. Out of this sum 1000*l.* should go to the master of the

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*Ousebridge*, and 2300*l.* to her officers and crew rateably, except that 300*l.* must be paid to the injured seaman in addition to his due share of the balance. Deducting from the total award of 11,500*l.* the sum of 3300*l.* the balance of 8200*l.* will remain for the owners of the *Ousebridge*.

I have been asked to apportion the salvage found payable as between ship and cargo, and I direct that the total sum I have named of 11,500*l.* shall be apportioned between ship and cargo in proportion to their respective salved values of 85,000*l.* and 20,828*l.*

Solicitors for plaintiffs: *Botterell & Roche, for Botterell, Roche & Temperley, West Hartlepool.*

Solicitors for defendants: *Stokes & Stokes, for Bramwell, Clayton & Clayton, Newcastle-on-Tyne.*

E. C. M. T.

## THE CHR. KNUDSEN.

1932
*July* 7.

*Shipping—Admiralty Jurisdiction—Action in Rem—"Damage done by a ship"—Raising Sunken Barge—Dockowners' Expenses—Supreme Court of Judicature (Consolidation) Act*, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 22, *sub-s.* 1 (*a*) (*iv.*); *s.* 33, *sub-s.* 2.

By s. 22, sub-s. 1 (*a*) (iv.), of the Supreme Court of Judicature (Consolidation) Act, 1925, the High Court in relation to Admiralty matters has jurisdiction to hear and determine "any claim for damage done by a ship"; and by s. 33, sub-s. 2, the jurisdiction may be exercised either in proceedings in rem or in personam.

The plaintiffs, as owners of a dock, brought an action in rem against the owners of the *C. K.*, a foreign vessel, to recover "the expenses incurred in and about the lighting, buoying, removal and destruction of the barge *A. B.*" which they alleged "was sunk in the plaintiffs' harbour by the negligence of the defendants."

The defendants moved to set aside the service of the writ on the ground that the claim was not for "damage done by a ship" within the meaning of the section.

*Held*, that the claim was within the meaning of s. 22, and accordingly could be brought in rem.

Motion to set aside the service of a writ in rem.

The defendants, the owners of the Norwegian motor vessel *Chr. Knudsen*, moved to set aside the service of a writ issued by the plaintiffs, the London Midland and Scottish Railway Company, to recover the expenses incurred in removing a barge, the *Ada Burton*, which had sunk in their harbour owing, as they alleged, to the negligence of the defendants.

On June 16, 1932, the *Chr. Knudsen*, while docking in the Stalbridge Dock, Garston, collided with and sank the *Ada Burton*. The plaintiffs, as owners of the dock, removed the wreck of the barge, and on June 23 issued the writ in the present action. The defendants gave an undertaking under protest to appear and put in bail.

*Lewis Noad* for the defendants. There is no precedent for a claim of this sort being brought in rem. It is not "damage done by a ship" within the meaning of s. 22, sub-s. 1 (*a*) (iv.), of the Supreme Court of Judicature (Consolidation) Act, 1925, which is in the same terms as s. 7 of the Admiralty

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Court Act, 1861. In *The Ella* (1), a similar case, the action was in personam and negligence was admitted. Unless a plaintiff has some right, title or interest in the chattel damaged at the time when the damage was done he has no right to arrest the ship doing the damage and proceed against her in rem. The plaintiffs had no interest in the barge at the time she was injured, and their premises were not damaged by the collision. The claim is not for damage done by the defendants' ship but for expenses subsequently incurred, and, if maintainable in rem, will have very far-reaching results. Further, the writ is bad because it does not contain any indication of the capacity in which the plaintiffs incurred the alleged expenses.

*Geoffrey Hutchinson* for the plaintiffs. The answer to the contention that the plaintiffs have no right to proceed in rem because they have no title or interest in the chattel injured is that the chattel which has been damaged by the defendants' ship is the dock itself, the property of the plaintiffs. If the defendants' contention were good it would have been a complete answer to the claim in *The Ella* (1) and in *The Solway Prince.* (2) Physical contact with the wrong-doing ship is not necessary: see, e.g., *The Industrie* (3); *The Port Victoria.* (4) [Reference was also made to *The Sylph* (5) and *The Beta* (6) (personal injuries), and to *The Clara Killam* (7) and *The Nightwatch.* (8)]

BATESON J. I think this motion must fail. On June 16 last a collision took place between a vessel called the *Chr. Knudsen* and a barge, the *Ada Burton*, whereby the *Ada Burton* was sunk in the Stalbridge Dock, Garston, owned by the London Midland and Scottish Railway Company. The affidavit filed on behalf of the defendants is to the effect that the *Ada Burton* was removed by the London Midland and Scottish Railway Company from the dock to the bank outside. In the affidavit of the representative of the railway

(1) [1915] P. 111.
(2) (1914) 31 Times L. R. 56.
(3) (1871) L. R. 3 A. & E. 303.
(4) [1902] P. 25.
(5) (1867) L. R. 2 A. & E. 24.
(6) (1869) L. R. 2 P. C. 447.
(7) (1870) L. R. 3 A. & E. 161.
(8) (1862) Lush. 542.

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company, however, it is stated that the wreck was an obstruction in the dock and rendered it unfit and unsafe for navigation, and that in order to remove such obstruction and make the dock properly safe and fit for navigation the plaintiffs had to raise and remove the wreck from the dock. The *Ada Burton's* owners, or their representatives, gave notice of abandonment of their barge on June 18. On the same day the representatives of the owners of the *Ada Burton* issued a writ against the defendants in this case, the owners of the *Chr. Knudsen*, for their damage; and also, on the same date, the London Midland and Scottish Railway Company gave notice to the owners of the *Chr. Knudsen* of a claim and of their intention to arrest and detain the *Chr. Knudsen* until bail was given to meet their claim. On June 23 the railway company issued their writ in rem in the present action. The indorsement upon it is as follows: "The plaintiffs claim for expenses incurred in and about the lighting, buoying, removal and destruction of the barge *Ada Burton* which was sunk in the plaintiffs' harbour by the negligence of the defendants or their servants in the month of June, 1932." On June 24 the solicitors for the defendants gave their undertaking, under protest, to appear and put in bail.

It is now contended for the defendants that there is no right in rem by the plaintiffs against the *Chr. Knudsen*, a contention based on the ground that what the plaintiffs claim is not "damage done by a ship." The argument put forward by Mr. Noad, for the defendants, as I understand it, is that a right to arrest the ship and proceed in rem is only given in Admiralty to the party who has the ownership of the chattel damaged, and that therefore, as the railway company have no title or interest in the chattel damaged, which he says is the barge, at the time of the accident or at any other time, they have no remedy in rem.

Mr. Hutchinson, for the railway company, relies upon the Supreme Court of Judicature (Consolidation) Act, 1925, which by s. 22, sub-s. 1 (*a*) (iv.), repeats the words of s. 7 of the Admiralty Court Act, 1861, and gives

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jurisdiction, which under s. 33 is exercisable in rem over "any claim for damage done by a ship." The question, therefore, which I have to determine is whether the claim of the plaintiffs is for damage done by a ship. I have not the least doubt that it is. The plaintiffs are the owners of the Stalbridge Dock, and the *Chr. Knudsen* did damage to that dock by sinking the barge and causing an obstruction in the dock. Whether they were negligent in so doing can only be ascertained when the case comes to be tried, but the allegation of the plaintiffs is that the defendants have been negligent, and I must assume that that is true for the purposes of this motion and that they have suffered damage to their property by reason of the alleged negligence of the *Chr. Knudsen*. In these circumstances it seems to me, without any doubt, that they are covered by the words of s. 22.

Mr. Hutchinson also says there is no question as to the right of the railway company to recover by an action in personam as for a tort. That was decided in *The Ella*. (1) He also referred me to numerous cases in which claimants had recovered by actions in rem although there had been no physical contact between the party injured and the ship. For instance, he referred to claims for personal injuries, to claims by master and crew for loss of effects, to a claim by a diver, to cases of damage done by a wash of a ship, to the case of a ship forced to run aground by the negligence of another ship, and to the case in which a telegraph cable was cut with an axe, in order to free the propeller, by the mate of a ship. There are a great many cases of that kind, in which the damage complained of has been held to be damage done by a ship, although there has been no physical damage directly occasioned by the ship.

Mr. Hutchinson argued that damage done by a ship means damage done by the navigation of a ship. I think that probably he is right, but in this case it is not necessary to consider or determine that having regard to my view that the owners of the dock have suffered damage by reason of this

(1) [1915] P. 111.

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barge causing an obstruction in the dock. That obstruction had to be removed, and the plaintiffs claim to recover as damages the expenses of lighting, buoying, removing and destroying that obstruction, and so reducing the damage done by the defendants' ship.

In my opinion the plaintiffs' claim is a perfectly good one on the face of it. Whether they will be able to prove their allegation of negligence is quite another matter. Mr. Noad tried to frighten me by saying what a serious thing it would be if all dock companies were entitled to sue in rem when a ship had the misfortune to sink another ship in dock or harbour. That does not frighten me in the least, if they can bring their claims within s. 22, and although the exhaustive research undertaken by Mr. Noad and those who instruct him has failed to find a precedent for such an action as this being brought in rem, I am not deterred from coming to the conclusion at which I have arrived. The explanation probably is that nobody ever before thought there was anything in the point raised by the defendants on this motion. That is the answer which can always be made when there is failure to find authority for a particular point. The motion will be dismissed with costs.

Solicitor for the plaintiffs: *A. Eddy.*

Solicitors for the defendants: *Pritchard & Sons, for Batesons & Co., Liverpool.*

E. C. M. T.

1932
*April* 22;
*June* 6.

## BEAUMONT *v.* BEAUMONT.

*Divorce—Practice—Abatement of Suit—Wife's Costs—Security—Death of Respondent Husband before Trial.*

After abatement of a divorce suit by reason of the death of the husband before trial, the fund lodged in Court by the husband as security for his wife's costs of the hearing is not available to the wife for her costs on taxation, nor can it be paid out to the solicitors for the wife even on their undertaking to pay to the personal representative of the husband any balance of the fund in Court over and above the amount found due to the solicitors of the wife on taxation.

*Cunningham* v. *Cunningham* (1897) 77 L. T. 405 dissented from.

*Brydges* v. *Brydges and Wood* [1909] P. 187 followed.

Adjourned Summons.

The wife in October, 1930, filed a petition asking for a judicial separation on the ground of the alleged cruelty of the husband. The husband answered and claimed a judicial separation at his instance. On July 10, 1931, the suit being ripe for hearing, an order was made that the husband should pay 43*l.* 7*s.* 1*d.*, the wife's costs to setting down, and further give security for 200*l.*, her estimated costs of the hearing. This latter amount had been lodged in Court, and its disposal was the subject of the present application. On November 12, 1931, it was further ordered that the husband should pay 153*l.* 4*s.* 1*d.* for costs of proceedings by the wife for alimony pendente lite and of attachment proceedings prosecuted by her. On November 14, 1931, there was an order for further security for 320*l.* This latter order was never fully complied with beyond the sum of 70*l.* levied by way of execution, and meanwhile on January 8, 1932, the husband died while the sum of 200*l.* remained lodged in Court. Correspondence followed between the solicitors with reference to the payment out of this sum to the executor of the deceased husband, as the suit, for the hearing of which it had been lodged, had abated by his death.

On February 26, 1932, a registrar made an order giving the wife leave to file a bill of her further costs, but the taxing registrar refused to proceed to the taxation of the bill in

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the absence of any further order for costs. On March 14, 1932, the registrar who had made the order of February 26 made a further order, varying his former order and giving the wife liberty to tax, and ordering that after taxation the fund in Court should be paid out to the solicitors of the wife on their undertaking to pay any balance over and above the amount of costs taxed to the personal representative of the husband and giving the personal representative of the husband liberty to attend the taxation.

The executor of the husband then took out the present summons, asking that the order of the registrar of March 14 be set aside as it was made without jurisdiction, and calling on the wife to show cause why the summons on which the order was made should not be removed from the file as improperly lodged in a suit which had abated.

*Clifford Mortimer* (*A. R. Ellis* with him) for the executor. The registrar had no jurisdiction to order taxation or payment to the solicitors of the wife, the suit having abated. Such a jurisdiction could only be in the judge; the registrar had no knowledge of the merits. Security does not mean that the wife necessarily gets costs out of the fund lodged. If she has any claim she can sue at common law for necessaries. Even a judge has no power except to order payment out to the husband after the suit has abated. The only authority the other way is *Cunningham* v. *Cunningham* (1), which was wrongly decided. *Brown* v. *Feeney* (2) is distinguishable, the wife in this case having got no order for costs. The application of the fund is discretionary. In *Brown* v. *Feeney* (2) the fund in Court arose from an admission of liability. The true principle appears in *Brydges* v. *Brydges and Wood* (3), and is that of abatement. The action being a personal one the executor of the deceased respondent is not subject to any order of the Court. The remaining cases, *Maconochie* v. *Maconochie* (4) and *Coleman* v. *Coleman and Simpson* (5), are in my favour. There is no

(1) 77 L. T. 405.
(2) [1906] 1 K. B. 563.
(3) [1909] P. 187.
(4) [1916] P. 326.
(5) [1920] P. 71.

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power to tax without an order to pay. The order to pay is an order in the suit. It must be made by a judge, and cannot be made after the suit has abated.

*T. Bucknill* for the petitioner. R. S. C., Order LXV., r. 1, applies, providing that costs shall be in the discretion of the Court or a judge. A judge is not the sole decisive tribunal. By r. 84 (Matrimonial Causes Rules, 1924) bills of costs may be taxed without any special order. By r. 41 any application under the Matrimonial Causes Rules not directed to be made to a judge may be made to a registrar. By r. 97 the Rules of the Supreme Court apply in the absence of special provision. Under these the registrar has the discretion of a judge in Chambers: R. S. C., Order LIV., r. 12. That discretion extends to the application of money in Court: *Brown* v. *Feeney*. (1) There is nothing in that case or in the Rules to show that the discretion is not exercisable by a registrar. In *Brown* v. *Feeney* (1) the application was originally made to a Master. I rely upon *Cunningham* v. *Cunningham* (2) as an authority for the order made in this case, although the suit has abated.

*Clifford Mortimer* in reply.

BATESON J. [after stating the facts, continued:] Counsel for the executor says that the registrar had no jurisdiction to order taxation, or to order payment out. It is not disputed that this order which the registrar has made is both an order for costs and an order to tax. Counsel contends that the registrar could not make an order for costs without knowing anything about the circumstances of the case, and that none of the circumstances of the case were before him. He points out that security for costs does not mean that the wife necessarily gets the costs, and says that the suit being abated no order could be made in it, and that before anything could be done with regard to the money in Court for the benefit of the petitioner there would have to be an order on the husband to pay costs and taxation of them in this suit. He admits that the Court has jurisdiction over

(1) [1906] 1 K. B. 563. (2) 77 L. T. 405.

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the fund and to order its payment out, but what he says is that no order can be made applying the fund for the purposes of a suit which has abated. He cites for that purpose *Brown* v. *Feeney* (1) (especially the passages in the judgment of Vaughan Williams and Stirling L.JJ. in which they pointed out that the action was no longer alive but was at an end); *Brydges* v. *Brydges and Wood* (2), a decision in the Court of Appeal; *Maconochie* v. *Maconochie* (3) (where Shearman J. points out that the result when one of the parties dies is that the action abates and comes to an end; it is dead and done with); and finally the case of *Coleman* v. *Coleman and Simpson.* (4) He says that inasmuch as the action is abated no order can be made in it adverse to the respondent such as has been attempted to be made in this case with regard to costs. Counsel also drew my attention to *Cunningham* v. *Cunningham* (5), in which there is a decision of Gorell Barnes J., as he then was, in 1897. That was a decision of the Court of first instance. But *Brown* v. *Feeney* (1) and *Brydges* v. *Brydges and Wood* (2) were both decisions of the Court of Appeal, and as far as I can see, from *Cunningham* v. *Cunningham* (5), which is very meagrely reported, the point was never taken there that the action was abated. It is quite true that there was money in Court in that action and the order was for taxation of costs, and the executors were to be at liberty to attend taxation. The whole judgment in that case is this: "The order now asked for must be made. The solicitors for the executors to be at liberty to attend taxation of the bill. The costs of to-day's application are to form part of the order." It does not appear that any question of abatement was discussed or referred to. As far as one can tell, it seems to have been assumed that an order to tax costs might be made. It is to be pointed out that in the present case, which has never been heard at all, there is no order for costs, and until there is an order for costs there ought not to have been an order

(1) [1906] 1 K. B. 563.
(2) [1909] P. 187.
(3) [1916] P. 326.
(4) [1920] P. 71.
(5) 77 L. T. 405.

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for taxation of costs, and, inasmuch as no order for costs can now be obtained, this order appealed against is bad.

Counsel for the wife, on the other hand, says that the Court has jurisdiction to make the order for costs. He first of all says that r. 41, coupled with r. 84 of the Matrimonial Causes Rules, 1924, gives the registrar power to award these costs and to order taxation. Rule 41 says: "All applications under these Rules which are not hereby directed to be made to a Judge may be made upon summons to a Registrar." It is to be noted that the applications in question are applications "under these Rules," and this particular form of application does not come, as far as I can see, or as far as I have had my attention drawn to it, under any of the Rules. Rule 84 says: "All bills of costs shall be referred to the Registrars for taxation and may be taxed by them without any special order for that purpose." Those are the words of the rule, but that seems to me only to refer to the powers of the registrars to tax bills of costs, and to mean that they may tax without any special order for taxation. It does not at all deal with the case of taxing bills of costs when there is no order for costs in existence, as is the case here. Then he says: "If the other divorce court rules do not help me, then there is r. 97 (Matrimonial Causes Rules, 1924), which says: 'In any matter of practice or procedure which is not governed by statute or dealt with by these Rules the Rules of the Supreme Court in respect of like matters shall be deemed to apply.'" He says that you are then thrown back on the Rules of the Supreme Court which take effect, and that Order LXV., r. 1, coupled with Order LIV., r. 12, supported by *Brown* v. *Feeney* (1), show that the registrar could make the order in this case. I do not think that his argument with regard to that is sound. Order LXV., r. 1, without stating it in detail, says that the costs are "in the discretion of the Court or Judge." I take that to mean the Court or the judge who hears the case, whatever the case may be. It may be a summons, it may be a motion, and it may be a case in Court; but it is the Court or the judge

(1) [1906] 1 K. B. 563.

who hears the case, whatever the case may be. It is quite true that Order LIV., r. 12, gives the registrar power to do anything that the judge may do in Chambers, but it does not seem to me that that carries you any further, because I do not think the judge in Chambers in this case could do anything in regard to an order for costs or an order for taxation, and, therefore, if he could not, it does not give the registrar any more power, because he has the same powers as the judge in Chambers. Counsel's principal argument was that the Court cannot deal with this fund until you know what the applicant's bill is. The difficulty, as it seems to me, is that without an order for taxation in a case which has been tried you cannot have a taxed bill, and I do not see how you are to get an order for taxation once a case has abated by reason of the death of one of the parties.

Counsel also relies upon *Cunningham* v. *Cunningham* (1), in which he says an order was made; but having regard to what has been said in the Court of Appeal, I think I must follow what has been said there and not what was said in *Cunningham* v. *Cunningham.* (1) It seems to me quite clear that this is an application in a suit which has abated, which according to these cases in the Court of Appeal cannot be made.

*Appeal allowed with costs.*
*Liberty to appeal.*

NOTE.

1932. June 6. The petitioner moved before the President (Lord Merrivale) for an inquiry into the amount of the further costs of the petitioner and payment thereof out of the fund, or in the alternative for directions as to the disposal of the fund in Court.

*Schiller K.C.* (*T. Bucknill* with him) for the petitioner. We rely on *Brown* v. *Feeney* (2) and *Cunningham* v. *Cunningham* (1) cited in the argument before Bateson J. [He also referred to *Maxwell* v. *Viscount Wolseley* (3), in which case *Brown* v. *Feeney* (2) was applied.] We do not contend that the registrar had jurisdiction to make the order that he did.

*Clifford Mortimer* (*Latey* with him) for the executor. The matter is res judicata. This is an attempt to reopen the decision of Bateson J. I consent

(1) 77 L. T. 405. (2) [1906] 1 K. B. 563.
(3) [1907] 1 K. B. 274.

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to the payment out of Court to the solicitors of the petitioner of the balance of the costs ordered to be paid on November 12, 1931, after giving credit for the amount obtained by levying execution. [He also referred to *Hall* v. *Hall*. (1)]

THE PRESIDENT (LORD MERRIVALE). The case raises a very interesting question. The wife resorted to the practice of the Court which provides security for wives who are suitors. By that practice an order is made to cover costs already incurred up to the entry of the case for trial, and, unless cause is shown to the contrary, the sum allowed is presently paid and an order is usually made at the same time for provision for security for the wife's further costs. That is a common form order, and it was made in this case. Besides the sum of 43*l*. 7*s*. 1*d*. found to be payable up to the entry of the case for trial the respondent husband was ordered to give security for 200*l*. "to cover the costs and expenses of the petitioner of and incidental to the hearing of the cause," and the husband paid that sum into Court. That is an order providing for the costs of the trial. It provides that the sum of 200*l*. should be secured and the petitioner's costs paid out of it if the judge at the trial thinks that it is a proper case for the payment to the solicitors of the wife of any costs and so orders. But the right of the wife to the fund in Court does not vest in the wife till that order is made at the trial. The jurisdiction of the Court in the meantime is limited to keeping the money in Court. It is impossible to make any order as to costs of the trial before the hearing, and the purpose for which the money was brought into Court has in this case failed. The conditional provision of the order is one that cannot now be satisfied. This motion must accordingly be dismissed with costs against the petitioner.

[The President directed that, with the consent of the executor, the balance of outstanding costs under the order of November 12, 1931, should be paid out of the fund in Court to the solicitors of the wife.]

Solicitors for the executor of the husband: *Scott & Son.*
Solicitors for the wife: *Mackrell, Ward & Knight.*

(1) (1864) 3 Sw. & Tr. 390.

R. M. M.

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*July* 28.

*Shipping—Detention of Warship—Assessment of Damages—Interest on Capital Value—Depreciation—Use of Admiralty Dry Dock and Cranes.*

A British battleship damaged by collision was put into a naval dry dock for her repairs. The ship's effective life was estimated at twenty years and she was under four years old at the time of the collision. In assessing the damages the registrar allowed nothing in respect of the use of the dock and cranes, on the ground that the Admiralty had suffered no pecuniary expenses or loss, and in respect of the loss of use of the ship for fifteen days, the time estimated for the collision repairs, he allowed interest at 2½ per cent. on half the initial cost of the ship for the fifteen days. The Admiralty appealed :—

*Held*, that the case must go back to the registrar for reassessment, for (i.) the ship occupied the dock and used the cranes, etc., to the exclusion of other vessels and some allowance, therefore, must be made to the Admiralty in respect of these items, and (ii.), having regard to the estimated life of the ship, her annual depreciation and cost of maintenance, the amount awarded for detention appeared to have been computed on a wrong basis.

Motion in objection to the registrar's report.

The claimants, the Lords Commissioners of the Admiralty, moved to set aside certain items in the report of the registrar on a reference to assess the damages occasioned by a collision between *H.M.S. Nelson* and the respondents' steamship *West Wales*. The collision occurred on March 29, 1931, and on December 8, 1931, the action was settled on the terms that the respondents paid the plaintiffs 60 per cent. of their proved damages. The items of which the plaintiffs complained were in respect of (*a*) dock rent and charges for use of cranes, and (*b*) loss of use of the *Nelson* during the time of the repairs. As regards (*a*) the registrar allowed nothing, on the ground that the Admiralty had suffered no pecuniary loss ; as regards (*b*) he allowed 3113*l.* as against 35,000*l.* claimed. The sum of 35,000*l.* was arrived at by taking the reduced capital value of the *Nelson* at 5 per cent. per annum for the number of days which the repairs occupied in excess of the period occupied by the annual refit.

The *Nelson* was built in 1927 and cost 6,520,000*l.* Her estimated life was twenty years, and the annual depreciation,

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therefore, was taken at one-twentieth of her original cost, less scrap value. The registrar, however, was of opinion that "if half the initial value of the *Nelson*, less scrap value, be taken, with interest at 2½ per cent., a reasonable allowance in respect of the fifteen days allowed will have been made."

*Raeburn K.C.* and *K. S. Carpmael* for the appellants. The registrar was wrong in disallowing the claim for the use of the dry dock and cranes. The ordinary dock rate of hire is 1¼*d.* per ton per day, and it is immaterial that the ship was in fact in a naval dockyard. The Admiralty were deprived of the use of the dock for any other vessel while the *Nelson* was there, and are entitled to dock rent and to remuneration for the use of the cranes, etc. As regards the claim in respect of the loss of use of the *Nelson*, while the registrar had to take all the circumstances into consideration, he appears to have ignored cost of maintenance and annual depreciation altogether, and there can be no justification, considering the life of the ship to be twenty years and that she was only three and three-quarter years old, to take only half her initial cost and award interest thereon at the very reduced rate of 2½ per cent.: see *The Chekiang* (1); *The Marpessa* (2); *The Greta Holme.* (3) In *The Chekiang* (1) interest at 5 per cent. on the capital value of the damaged cruiser, the *Cairo*, was taken, and in the present case the damaged battleship happens, unfortunately for the defendants, to be a very much more costly vessel.

[Reference was also made to *The Astrakhan* (4); *The Susquehanna* (5); and *Clydebank Engineering and Shipbuilding Co.* v. *Yzquierdo y Castaneda.* (6)]

*Alfred Bucknill K.C.* and *Cyril Miller* for the respondents. Interest or capital value as the basis of compensation in the case of non-commercial vessels is, as the registrar observed in the reasons for his report, not "a matter of rule of thumb," but is to be applied "having regard to all the facts." The

(1) [1926] A. C. 637.
(2) [1906] P. 95; [1907] A. C. 241.
(3) [1896] P. 192; [1897] A. C. 596.
(4) [1910] P. 172, 181.
(5) [1926] A. C. 655.
(6) [1905] A. C. 6, 12.

facts were that the *Nelson* would merely have been lying in harbour instead of in dry dock, while the damage repairs were being executed, and while in dry dock a portion of the crew's exercises and training were still carried on. Under these circumstances an award of 5 per cent. on the very large capital value of the ship at the time of the detention would be altogether exorbitant and far in excess of any problematical loss to the Admiralty in time of peace. The registrar acted as a jury, and the award is a mere matter of quantum. "The calculation must be a very uncertain test of the true daily value of the user lost," as Lord Sumner said in *The Chekiang*. (1) Similarly, with regard to the use of the dock and the cranes, the dock would have been empty and the cranes idle during the time occupied by the damage repairs.

*Raeburn K.C.* replied.

BATESON J. I think this case must go back to the learned registrar.

The collision happened on March 29, 1931. The vessel in collision was the *Nelson*, the flagship of the Home Fleet, and a merchant ship, the *West Wales*. The case was settled on terms of 60 per cent. blame against the *West Wales* and 40 per cent. against the *Nelson*.

The *Nelson* was due for the summer cruise in home waters between April 29 and July 21. She had some temporary repairs done to her and left in time for her summer cruise. She was due for her annual refit in June, which would have lasted forty-two days, and she was due for her autumn cruise to begin on September 9. As a matter of fact her summer cruise was shortened, and she was brought back on June 24, because it was known that her collision repairs would exceed her annual refit repairs. She was docked on July 1, and undocked on August 31. She was able to leave Portsmouth on September 11, two days after the rest of the fleet.

The time allowed for her repairs has been fifteen days, and Mr. Raeburn does not dispute the numbers of days, but what

(1) [1926] A. C. 637, 647.

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he does quarrel with are certain items, Nos. 4, 8 and 11 in the learned registrar's report. Nos. 4 and 8 are the same point, to my mind. No. 4 is: "Dock rent (34 days at $1\frac{1}{4}d.$ per ton per diem) on 25,618 tons—4536*l.* 10*s.*" No. 8 is: "Charges for use of cranes for docking and cleaning and coating bottom." The learned registrar has allowed nothing for either of those items. I think it is clear that something must be allowed. What the figure may be is a matter for him to decide, but I do not think it can be right to say that the Admiralty have suffered no loss by giving up their dry dock and by using their cranes in doing these repairs. The *Nelson* occupied the dock to the exclusion of other ships, and made use of the cranes and so on for the purpose of docking and cleaning and coating the bottom, which would be necessary in connection with these repairs. Docks and cranes cannot be used without expense, and there must be some damage to the Admiralty from these matters. The learned registrar says that in respect of these there was not a pecuniary expenditure or loss and, therefore, these items are not allowable. I think that is wrong. I think there was pecuniary expenditure and loss. It may not be actual money paid out to any particular person, but these expensive appliances cannot be utilized without some loss.

With regard to item 11: "Loss of use of *H.M.S. Nelson* for twenty days," that is a question which depends on a proper application of such principles as are to be discovered in the books, and particularly those in *The Chekiang* (1), with regard to warships. The quantum is, of course, a matter entirely for the learned registrar but, in this case, I cannot think, from reading his report, that he has paid sufficient attention to what are the principles laid down in that case. He refers to *The Chekiang* (1) in his report in this way: "There is no doubt that the claimants are entitled to damages for the deprivation of their vessel, and also that the basis of interest on a capital value has been judicially approved as a means for arriving at a figure to represent the damages suffered." Interest upon capital value is not the only thing

(1) [1926] A. C. 637.

that has been laid down, and it looks to me as if the learned registrar had rather overlooked other matters that are referred to in the judgments. " It is equally clear, however, from *The Susquehanna* (1) "—he goes on to say—" and those cases which preceded it, that this basis is not to make the award a matter of rule of thumb but that as far as possible the tribunal is to apply it having regard to all the facts before it." There he is repeating what I think he has said above, that he has to apply " it "—that is, " the basis of interest on a capital value." He says nothing there about depreciation or maintenance. " It is obvious, for example, that the circumstances of the time, whether it be one of war or peace, must have weight in the case of a battleship not less, for instance, than the possibility of a cruiser's use as was, in *The Chekiang* (2), that of the *Cairo*, a light cruiser. Again, the *Nelson* was not completely out of use, for drills and exercises were continued. A merchant vessel, when in dock, is prevented from being loaded and discharged and proceeding from port to port and is totally out of use, and the delay is an absolute loss to her owner." That passage has given me a little difficulty, because, to my mind, when the *Nelson* was in dock she, as a ship, was totally out of use. It may well be that some of the crew, part of the time, were standing by and were not allowed to be idle, but, so far as any use by the Admiralty of the ship is concerned, it seems to me she was quite out of use. The small amount of training which might go on would, I should think, be negligible. It might almost as well be said that, because the owner of a merchant ship has the captain and officers standing by the ship and remaining on board to carry out their duties, the owner does not lose the use of his ship. I have never heard that put forward as a ground for reducing damages in favour of the tortfeasor. The learned registrar continues : " Various other points occur for consideration, but there are not substantial data as in the case of a commercial vessel which afford safe guidance, and calculations based on annual depreciation and interest are not conclusive guides." There he

(1) [1926] A. C. 655. (2) [1926] A. C. 637.

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does mention depreciation as well as interest. Then comes the final passage: "In our view, taking all the facts into consideration, if half the initial value of the *Nelson*, less scrap value on this initial value, be taken, with interest at $2\frac{1}{2}$ per cent., a reasonable allowance in respect of the fifteen days allowed will have been made."

I think that what has happened here is that the learned registrar, while saying that all the facts have to be taken into consideration, has taken, as part of the facts, half the initial value of the *Nelson*, less scrap value, with interest at $2\frac{1}{2}$ per cent. That seems to me to be one of the bases on which he has formed his judgment of the proper award to make. I do not think that is right. It is not disputed that the *Nelson* has an estimated life of twenty years, and that at the time of the detention she was three and three-quarter years old. Therefore, to take half her initial value at the time of this loss seems to me to be quite wrong.

Then, again, has the learned registrar taken into account depreciation? I do not know. He mentions it in one place and leaves it out in another, but the depreciation on this ship for one year is 322,500*l.* and, of course, even for the fifteen days it would be a considerable sum. Whether he has considered that the ship did not deteriorate so fast in the dock, or not, I do not know, but that is quite a different thing from the depreciation of a ship which is depreciating every day of her life at a very high rate, seeing the shortness of her life and her very high cost. Then there is the item: "Annual cost of maintenance repairs," which he has not paid any attention to so far as one can see. Lastly, the interest that he has calculated on his reduced value is taken at $2\frac{1}{2}$ per cent. That, again, seems to me to be a figure which cannot be justified at the time of the trouble that the *Nelson* was in. So much for the facts.

With regard to the law on the matter, I think that it is necessary to follow the decision in *The Chekiang* (1), which really sums up the other cases as well. Lord Sumner, in his speech, says: "*The Marpessa* (2) was a decision which was

(1) [1926] A. C. 637, 647, 649, 650, 653. (2) [1907] A. C. 241.

consequent on *The Mediana* (1), and *The Mediana* (1) professed to follow the 'principle' of *The Greta Holme.* (2) The only principle as to this measure that I can find there stated is in Lord Herschell's words"; and then he cites the words: "'How can they the less be entitled to damages because, instead of hiring a dredger, they invested their money in its purchase? The money so invested was out of their pockets, and they were deprived of the use of the dredger, to obtain which they had sacrificed the interest on the money spent on its purchase. A sum equivalent to this, at least, they must surely be entitled to.' To this I would add Lord Loreburn's words above quoted: 'Those services are at least worth what we are habitually paying for them year after year, including what we sacrifice in depreciation.'" At the end of his judgment he says: "I am of opinion that, in the present case, there is no ground for interfering with the conclusion of the learned registrar, but I think that, except in cases very strictly comparable with the present case, or in cases where admissions are made, the Admiralty could be required, as part of their claim, to give evidence of the character of the ship, to explain what her duties are and the true relation of the original cost to her duties at the time of the damage, and so to enable a clear judgment to be formed of the appropriate rates of depreciation and of interest." What the several Lords insist upon is that the deprivation to the complainant is a deprivation of interest on money spent on the thing purchased, "a sum equivalent to this, at least, they must surely be entitled to"—that is Lord Herschell. Lord Loreburn says: "Those services are at least worth what we are habitually paying for them year after year, including what we sacrifice in depreciation"; and "judgment to be formed of the appropriate rates of depreciation and of interest." Lord Phillimore in his speech says: "As I have ventured already to observe, ships of war are not built, commissioned or put on station for idle purposes, and it is to be presumed that they are worth to the State which owns them what it has cost the State to construct and to run them."

(1) [1900] A. C. 113. (2) [1897] A. C. 596, 605.

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The principles enunciated in those passages also are consistent with the observations of Sir Gorell Barnes in *The Marpessa* (1), where he speaks of the plaintiffs "having sufficient to compensate them for their actual out-of-pocket expenses, depreciation upon the vessel, and loss of interest upon the capital." In my opinion, therefore, this matter will have to be reinvestigated. Of course, in arriving at the figure for the depreciation of the ship, and the other items, all the circumstances have to be taken into account. How the learned registrar will do that is for him, but I think he must apply the principles I have stated, and I think he has not done so in the report that is before me. For these reasons these three items will go back for his further consideration. Of course, if the learned registrar says that he has—although I do not find it in the report—followed what I have suggested he will say so.

Solicitor for the appellants: *The Treasury Solicitor.*

Solicitors for the respondents: *Ince, Roscoe, Wilson & Glover.*

(1) [1906] P. 14, 31.

E. C. M. T.

## CROKER *v.* CROKER.

C. A. 1932 June 22, 23; July 1.

*Divorce—Practice—Appeal—Petition for Divorce—Verdict of Jury for Respondent—Application by Petitioner for new Trial—Power of Court of Appeal to set aside Verdict and grant Decree Nisi—Rules of Supreme Court, Order* LVIII., *r.* 4; *Order* XXXIX.

On an appeal from an order of the Divorce Court dismissing a petition for divorce, the Court of Appeal has power under Order LVIII., r. 4, and Order XXXIX., if it has before it all the necessary materials, and comes to the conclusion that the verdict of the jury finding there has been no misconduct was wrong, itself to grant a decree nisi instead of sending the case back for a new trial.

APPEAL from a decision of Langton J. dismissing a husband's petition for divorce tried by him with a jury.

The following statement of facts is taken substantially from the judgment of Lord Hanworth M.R. :—

The parties were married on April 27, 1918, and there were three children of the marriage. On December 6, 1930, the husband presented his petition for divorce and named the co-respondent as the adulterer with whom his wife had committed adultery. In January, 1931, the wife put in her answer denying the adultery. In July particulars were filed. At the trial it appeared that the parties had not been living together as husband and wife for about three years. The reason why the husband withdrew from cohabitation was because the wife had admitted adultery with a named person. The co-respondent lived not far away from the petitioner and the respondent. The petitioner and his wife still occupied the same house. There was cogent evidence that the respondent had sought access to the co-respondent. There was evidence that they had often been seen together, that they had been in the same room with the blinds partly drawn and that the co-respondent was there seen fondling and kissing the respondent, and that they had been out for motor drives alone together.

These circumstances showed access, intention and opportunity, and if on that evidence the jury had found for the petitioner there could have been no objection to the verdict.

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In addition two documents were produced, first, a confession by the wife, and, secondly, a note found in her private hand-bag from the co-respondent informing her "I have told Ethel (his wife) all." Those two documents were, in the opinion of the Court of Appeal, admissible in evidence, and must be construed according to their tenor. The confession o the wife contained information which could have been known only to the wife—namely, the places and dates of the misconduct. Those two documents, the confession by the wife and the confession by the co-respondent, the Court held to be conclusive.

The trial took place before Langton J. and occupied several days. The jury gave what Langton J. characterized as a surprise verdict, that the wife had not committed adultery with the co-respondent. The co-respondent had given no notice of appearance and did not appear at the trial, and his case was not tried by the jury. Langton J. was minded to find that the co-respondent had committed adultery with the respondent, but he found himself embarrassed by the verdict of the jury. He accordingly directed judgment to be entered for the co-respondent, but gave leave to appeal.

When the matter came before the present Court of Appeal, the Court found that the co-respondent had committed adultery with the respondent, and set aside the judgment of Langton J. on the ground that the verdict of the jury was one that no reasonable body of men could have come to, and they also directed that judgment should be entered against the co-respondent.

The only question calling for a report was whether the Court of Appeal, after finding that the verdict was against the weight of evidence and that adultery between the respondent and co-respondent had in fact been proved, could at once make a decree nisi, or whether the power of the Court was limited to ordering a new trial of the petition.

*Compton Miller* for the husband.

*F. H. Collier* for the wife.

*Cur. adv. vult.*

July 1. The judgment of the Court (LORD HANWORTH M.R., SLESSER and ROMER L.JJ.) was delivered by

LORD HANWORTH M.R. This is a husband's petition for divorce. We have already given judgment on that part of the case which relates to the co-respondent. The facts are these. [His Lordship stated the facts and continued :] There remains the question whether we should send back the respondent's case for a new trial or should ourselves grant a decree nisi. I now give the judgment of the Court on that point.

It is plain from *Wilkins* v. *Wilkins* (1) that an appeal from the Divorce Court to the Court of Appeal is governed by the same rules as those which apply to cases coming from the King's Bench Division. Lord Lindley expressly said (2) : " The practice is governed by the Rules of the Supreme Court which apply to proceedings in the Court of Appeal " ; and that ruling has been acted on in a number of cases.

By Order LVIII., r. 4, the Court of Appeal has power " to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require." In Order XXXIX., which governs proceedings for a new trial, there are also relevant rules. By r. 1 : " Every application for a new trial or to set aside a verdict, finding, or judgment where there has been a trial with or without a jury shall be made to the Court of Appeal." Rule 2 states : " Every such application shall be brought before the Court of Appeal in like manner as an appeal, and on the hearing of such application the Court of Appeal shall have all such powers as are exercisable by it upon the hearing of an appeal." In r. 6 it is laid down : " A new trial shall not be granted on the ground of misdirection or of the improper admission or rejection of evidence, or because the verdict of the jury was not taken upon a question which the Judge at the trial was not asked to leave to them, unless in the opinion of the Court of Appeal some substantial wrong or miscarriage has been thereby occasioned; . . . ." All those rules carry out the principle of Order LVIII., r. 4—namely, that the Court

(1) [1896] P. 108. (2) [1896] P. 113.

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of Appeal is to have full power to give such judgment as ought to have been reached in the Court below. In the present case the application was for divorce and for 50*l.* damages for the wrong done, but in this Court the petitioner has withdrawn his claim for damages, so that the only question to be decided is as to the relief to be given on the petition for divorce.

In *Millar* v. *Toulmin* (1) judgment was entered by the Court of Appeal in favour of a plaintiff who had been unsuccessful in the Divisional Court, on the principle that on an application for a new trial the Court of Appeal had power under Order LVIII., r. 4, to give judgment for the party in whose favour the verdict ought to have been given, instead of directing a new trial. Bowen L.J. said (2): "I agree with the Master of the Rolls that under Order LVIII., r. 4, the Court of Appeal has power to relieve against all miscarriages of justice, and can direct judgment to be entered, if satisfied that no jury could properly come to a different conclusion." Applying those words to the present case this Court was satisfied that no jury could reasonably have come to any other decision than that adultery had been committed. The co-respondent did not give evidence, nor attend the trial. So we have here the same materials as were held to be sufficient in *Millar* v. *Toulmin* (1) to justify us in entering judgment for the petitioner.

In *Allcock* v. *Hall* (3) it was again determined that the Court of Appeal could enter judgment for either party instead of ordering a new trial. Lopes L.J., after referring to the rule made in August, 1890, pursuant to Mr. Finlay's Act (the Supreme Court of Judicature Act, 1890, 53 & 54 Vict. c. 44), said (4): "I think that the effect of that rule is to put a motion for a new trial in the same position as an appeal; and if that be so, a motion for a new trial will be governed by Order LVIII., r. 4. When we contrast that rule with the corresponding rule which applied to motions for a new trial in a Divisional Court, Order XL., r. 10, the difference in the

(1) (1886) 17 Q. B. D. 603.
(2) Ibid. 605.
(3) [1891] 1 Q. B. 444.
(4) Ibid. 448.

language is very marked. Rule 10 of Order XL. contained the words, 'Not inconsistent with the finding of the jury'; but there are no similar words in rule 4 of Order LVIII. This is a most important difference. Therefore, in my opinion, under the circumstances of the present case, the Court of Appeal has power to enter judgment for the defendants. *Millar* v. *Toulmin* (1) is a direct authority upon the construction of Order LVIII., r. 4, so far as it related to an appeal to the Court of Appeal before Mr. Finlay's Act; and if I am right in saying that motions for a new trial are now governed by the same rules, that authority is applicable to the present case." And the Lord Justice came to the conclusion that, as no fresh evidence could be usefully given on behalf of the plaintiffs, the right course was for the Court of Appeal to enter judgment for the defendants.

The question, therefore, is whether the course followed in *Millar* v. *Toulmin* (1) still stands good or whether it does not apply to the case of an affirmative judgment.

In *Paquin, Ld.* v. *Beauclerk* (2) Lord Loreburn, after referring to *Millar* v. *Toulmin* (1) and *Allcock* v. *Hall* (3) said (4): "Obviously the Court of Appeal is not at liberty to usurp the province of a jury; yet, if the evidence be such that only one conclusion can properly be drawn I agree that the Court may enter judgment. The distinction between cases where there is no evidence and those where there is some evidence, though not enough properly to be acted upon by a jury, is a fine distinction, and the power is not unattended by danger. But if cautiously exercised it cannot fail to be of value."

In *Skeate* v. *Slaters, Ld.* (5) Buckley L.J. went through the authorities on the point, and accepted the principle laid down in *Millar's* (1), *Allcock's* (3), and *Paquin's* (2) cases. It is true that he called attention to the criticism of Lord Halsbury in *Toulmin* v. *Millar* (6) in the House of Lords, the criticism being directed against the giving by the Court of Appeal of an affirmative judgment, in the plaintiff's favour, with

(1) 17 Q. B. D. 603.
(2) [1906] A. C. 148.
(3) [1891] 1 Q. B. 444.
(4) [1906] A. C. 148, 161.
(5) [1914] 2 K. B. 429, 440.
(6) (1887) 12 App. Cas. 746.

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assessment of damages, but, as pointed out in several cases, where the evidence was such that it pointed in one way only and was consistent only with one verdict which ought to have been given, that criticism did not apply.

In *Banbury* v. *Bank of Montreal* (1) Lord Atkinson dealt with the same point, and did not dissent from *Millar* v. *Toulmin* (2) and the other cases. Finally, in *Rutherford* v. *Richardson* (3), Lord Birkenhead clearly accepted the view that it was in the power of the Court of Appeal to do what it thought in the interests of justice ought to have been done in the Court below.

In the present case the evidence practically compelled a verdict in one way, and, as it was laid down by the Court of Appeal in *Rugg-Gunn* v. *Rugg-Gunn and Archer* (4) that parties to a matrimonial suit had now no inherent right to insist on having trial by a jury, not only is it unnecessary to send the case back for a new hearing, but the Court would be failing in its duty if it did not do what was required of it under Order LVIII., r. 4—namely, to give the relief which ought to have been given below.

The right order, therefore, is to allow the appeal, and for this Court to grant a decree nisi to the petitioner for the dissolution of the marriage with costs here and below.

*Appeal allowed and decree nisi granted.*

[After some discussion with counsel the Court ordered that the decree should date back to the date of the hearing of the petition on December 9, 1931, and that notice should be given at once to the King's Proctor.]

Solicitors for the appellant: *Kingsford, Dorman & Co., for Kingsford, Arrowsmith & Wightwick, Canterbury.*

Solicitors for the respondent: *Lea & Lea, for Mercer & Cadle, Canterbury.*

(1) [1918] A. C. 626.
(2) 17 Q. B. D. 603.
(3) [1923] A. C. 1, 8.
(4) [1931] P. 147.

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AND

# INDEX

TO

# 1932.—Vol. II. K.B.: 1932, P.

DECEMBER 7.

PUBLISHED BY THE COUNCIL AT ITS OFFICE, 30, MONTAGUE STREET, LONDON, W.C. 1,

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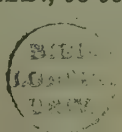
PRINTED BY W. SPEAIGHT & SONS, LTD., 98-99, FETTER LANE, LONDON, E.C. 4.



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